# In the Supreme Court of the United States

OCTOBER TERM, 1963.

No. 489.

HUDSON DISTRIBUTORS, INC.,
*Appellant,*

vs.

THE UPJOHN COMPANY,
*Appellee.*

No. 490.

HUDSON DISTRIBUTORS, INC.,
*Appellant,*

v.

ELI LILLY AND COMPANY,
*Appellee.*

ON APPEAL FROM
THE SUPREME COURT OF THE STATE OF OHIO.

## REPLY BRIEF OF APPELLANT.

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### I. PRELIMINARY STATEMENT.

With one important exception, the Briefs of Appellees, The Upjohn Company ("Upjohn") and Eli Lilly and Company ("Lilly") present a similar approach to the problems in these appeals. Upjohn goes to considerable lengths to show a "stipulation" whereby all Federal issues were removed from the case in the courts below. Lilly was not aware of any such "stipulation." In Lilly's view, "the

*non-constitutional* issues were reserved by stipulation for subsequent adjudication." (Lilly Brief, at 9.)

Both Briefs seek to avoid a ruling by this Court on issues of national importance—the proper scope of the exemptions from antitrust afforded by the Miller-Tydings and McGuire Acts; and whether the Ohio Statute (O. R. C. 1333.27 through 1333.34, inclusive), is outside the scope of Congressional intention under these exemptions where a state has eliminated a "nonsigner" clause. Appellees seek to avoid such ruling both upon substantive and procedural grounds.

**A. Avoidance of ruling upon substantive grounds.**

The avoidance of ruling upon substantive grounds is sought by wholly ignoring the origin and history of the Ohio Statute. Appellant has shown that the Ohio Statute was based upon proposed Congressional legislation of 1958 which, in revolt against the "contracts and agreements" methods of McGuire, would "organize the market" at fair trade levels for wholesale and retail distribution of goods in interstate commerce. The new "organizing" was to be based upon a notice of a "proprietor's" retained "proprietary interest" in trademarks and trade names. Under the protective umbrella of this congressional legislation, "diverting" of fair trade goods to "discounters" would be halted and fair trade "cooperatively enforced"—a cooperative program presently illegal under the Sherman Act. The *McKesson and Robbins* doctrine would be uprooted.

Moreover, Appellees wholly ignore the two hundred pages of the Record presenting the legislative history within the State of Ohio (R. 161-366)—a history which Upjohn added to the Record in the Courts below. This Ohio legislative history shows how the MacLachlan and Harris proposed national legislation of 1958—even to statements

of policy—was adopted in Ohio. No attempt was made to reconcile this Ohio legislation with the Federal enabling legislation. The only change made in Ohio from the proposed congressional legislation was the addition of a few "notice contract" provisions from the 1958 Virginia "fair trade" legislation.

So basic and radical a shift in interstate market structure and theory may be enacted solely by the Congress. Appellees wholly ignore the enactment by the Ohio Legisture of this "illegal system of distribution" in commerce, with an added "patch" of "notice contracts" in token compliance with the exemptions for fair trade legislation contained in the Miller-Tydings and McGuire Acts.

**B. Avoidance of ruling upon procedural grounds.**

Appellees also seek to avoid any ruling by this Court upon jurisdictional grounds. The first such ground is that "the judgment below (and in the *Lilly* case, No. 490) does not have the requisite finality." (Upjohn Brief at 1; Lilly Brief at 1-2.)

The second jurisdictional contention is made that the five Federal questions presented were not "actually or necessarily decided by the Ohio Supreme Court." (Upjohn Brief at 14; Lilly Brief at 12-14.)

Neither of these procedural contentions is tenable. Upjohn's principal basis for the procedural contentions rests upon a "stipulation" which is discussed and relied upon through much of Upjohn's Brief (e.g., pp. 2, 3, 6, 9-10, 11, 12, 13, 14, 22, 25, 27-32). By this "stipulation," Upjohn contends all Federal questions were reserved for trial upon Upjohn's Counterclaim and Hudson's Reply. Lilly concedes that only "non-constitutional issues were reserved by stipulation for subsequent adjudication." (Lilly Brief, at 9.)

Since Upjohn's "stipulation" issue is pervasive, appellant will first discuss it.

## II. THE ALLEGED STIPULATION.

### A. The parties below did not stipulate for the reservation of the Federal issues for later trial upon Upjohn's Cross-Petition and Hudson's Answer thereto, and Appellees joined in Hudson's motion to certify to the Supreme Court of Ohio on broad Federal and State issues.

Upjohn's basis for asserting that there was an agreement for the reservation of the Federal issues appears at page 9 of its Brief:

> "Before the oral argument on the motion for summary judgment which was heard on May 5, 1960, counsel for both parties stipulated in open court that only the constitutional issues raised in Hudson's Petition and Upjohn's answer would be heard by the court, and the issues raised by Upjohn's Cross-Petition for injunction and Hudson's Amended Answer thereto (*McKesson & Robbins* and waiver) would be reserved for future determination. This stipulation eliminated the issues on which factual disputes were presented and enabled the court to proceed without trial on the basic legal issue of the validity of the Ohio Act *under the Ohio Constitution*." (Italics added.)

Upjohn's limitation of the stipulation to "the validity of the Onio Act *under the Ohio Constitution*" is wholly unwarranted. No such limitation appears in Upjohn's quotations from Hudson's Briefs. Hudson stated that by stipulation, "the litigation was * * * narrowed to the basic issue of the constitutionality of the new Fair Trade Law." Upjohn has seen fit to add the qualifying phrase "under the Ohio Constitution."

Neither the courts below nor Upjohn understood that the litigation was confined by any such "stipulation" as is

now for the first time urged upon this Court. Rather what was comprehended was a severance of the Petition and Answer and Reply from the Cross-Petition and Amended Answer thereto, in accordance with Ohio practice, *so that all issues of constitutionality might be first determined by appellant's declaratory judgment action.*

The interpretation Upjohn now for the first time seeks to give the stipulation cannot be reconciled with its position in the Courts below. When Appellant filed its Petition for Rehearing in the Court of Appeals (R. 409-410) and suggested that the Court may not have considered the Federal issues including the *McKesson* issue, Upjohn's Brief as Defendant-Appellant in Opposition to Petition for Rehearing* contended that Hudson's position "borders on the ludicrous" (Appendix A, *infra*, p. 54).

Upjohn also joined in Hudson's Motion to Certify this case to the Ohio Supreme Court on broad assignments of error of unconstitutionality both under the Ohio Constitution and the Federal Constitution and statutes. The Answer of The Upjohn Company to Brief in Support of Motion to Certify Record* noted specifically that Hudson's assignments of error included Federal issues (Appendix A, *infra*, p. 57). Moreover, Hudson's Brief in Support of Motion to Certify Record included a statement of the Federal issues. (Appendix A, *infra*, pp. 56-57, and Appendix C, *infra*, pp. 73-74.)

**B. The Federal issues were not abandoned by any joint consideration of issues in the Upjohn (No. 489) and Lilly (No. 490) cases limited to the Ohio Constitution.**

In this Court, Upjohn also argues (pp. 11-12) for the first time an abandonment by Hudson of Federal issues since the *Upjohn* case (No. 489) and the *Lilly* case (No.

* A certified copy of this Brief has been deposited by Hudson with the Clerk of this Court.

490) were jointly considered "in each of the Courts below" on the limited "common issue" of constitutionality of the Ohio Act "*under the Ohio Constitution.*"

This contention is directly contrary to the understanding of Lilly's Ohio counsel. In the summer of 1963, Lilly's Ohio Counsel took the position in litigation upon the Cross-Petition in Case No. 490 that all Federal issues concerning its fair trade contract and its practices thereunder had been resolved by the Supreme Court of Ohio (Appendix B, *infra*, pp. 63-64).

In arguing for the existence of a "stipulation" removing Federal issues from consideration by the Courts below, Upjohn is gravely in error. This error stems, it is suggested, from the possible unfamiliarity of Upjohn counsel in this Court with all the proceedings of other counsel in the courts below, and the fact that the acts and conduct which create the basic conflict between the Ohio Statute and the Supremacy Clause of the Constitution also relate to Upjohn's standing in equity to enforce its Cross-Petition.

**C. Ohio appellate practice requires its Appellate Courts to decide all issues raised by assignment of error and by Brief.**

In contending that the Ohio Courts did not "actually or necessarily" decide all or any of the Federal questions (Upjohn Brief, 14-15, 25-32; Lilly Brief, 12-14, 22-33), Appellees fail to take into account the requirements of Section 2505.21, O. R. C. which commands:

> "*Appeals taken on questions of law shall be heard upon assignments of error filed in the cause or set out in the briefs of the appellant before hearing.* Errors not specifically pointed out in the record and separately argued by brief may be disregarded, but *the court*

> *may consider and decide errors which are not assigned or specified.* Failure to file such briefs and assignments of error within the time prescribed by the court rules is cause for dismissal of such appeal. *All errors assigned and briefed shall be passed upon (by) the court.* * * *" (Italics added.)

This statute is deemed to be binding both upon the Supreme Court of Ohio and all lower appellate courts.

The liberal Ohio appellate practice on the scope of issues before a reviewing court is further enhanced by the rule that assignments of error are not required to be labeled so long as they are clearly set forth by brief. *Neale v. Board of Liquor Control*, 80 O. L. Abs. 587, 160 N. E. (2nd) 352 (Ct. App. Franklin Cty., 1959). Errors will be deemed to be abandoned and disregarded by a reviewing court only when they are not mentioned or discussed in appellant's brief. *Riss & Co. v. Bowers*, 114 Ohio App. 429, 183 N. E. (2nd) 786 (Ct. App. Franklin Cty., 1961).

The Ohio Courts on appeal are also free to rule upon any error disclosed by the record whether or not specifically directed to the attention of the Court by brief or otherwise. *In re Ramsey*, 164 Ohio St. 567, 132 N. E. 2d 469 (1956).

The importance of the brief in Ohio appellate practice is reflected in the Rules of the Supreme Court of Ohio, which require that assignments of error be specified by brief both in support of the motion to certify to the Supreme Court and in the brief on the merits. (Rules of the Supreme Court of Ohio, Rule II, Section 2(A)(a); Rule VIII, Section 3(a).)

When Appellees joined in Hudson's motion to certify to the Supreme Court of Ohio upon the grounds set forth in Hudson's Brief in Support of Motion to Certify, their counsel did so in the light of the established Ohio rules that:

(a) appealable orders must be "final." O. R. C. Sections 2505.03, 2505.28. *Cincinnati v. Gormany*, 96 Ohio St. 596, 118 N. E. 1082 (1917); and *Bradford v. Micklethwaite*, 163 Ohio St. 301, 127 N. E. 2d 21 (1955) (concurring opinion).

(b) issues may not be raised on appeal which were not raised in the courts below. *In re Bowen*, 141 Ohio St. 602, 49 N. E. 2d 753 (1943); 3 *Ohio Jur.* 2d, Appellate Review, § 185 at p. 38.

Because of the importance of briefs in Ohio appellate procedure, when Hudson filed its Notice of Appeal in the Supreme Court of Ohio (R. 426-427) and requested the "transmission to the clerk of the Supreme Court of the United States * * * of all pleadings, original papers, testimony and evidence offered, heard, and taken into consideration in rendering the judgment aforesaid," the Clerk of the Supreme Court of Ohio sent to the Clerk of the Supreme Court of the United States every document, *including briefs*, filed by Hudson, Upjohn and Lilly in the Ohio Supreme Court, except the briefs of Appellees whereby they joined in Hudson's motion to certify. As previously noted, Hudson has lodged with this Court certified copies of Appellees' briefs joining in the motion to certify.

**D. The record in this Court affirmatively discloses that there was duly drawn in question the validity of the Ohio Fair Trade Act because of repugnance to the Constitution and laws of the United States.**

By reason of the foregoing course of appeal in the Ohio courts and the lodging in this court by the Supreme Court of Ohio of the briefs, motions and documents filed therein, with the exception of the briefs joining in Hudson's Motion to Certify, Upjohn's reliance upon *Live Oak*

*Water Users' Ass'n. v. Railroad Commission*, 269 U. S. 354 (1926), at page 25 of its Brief, is misplaced. By contrast with the *Live Oak* case, in the case at bar, briefs *were* part of the record filed with this Court.

Moreover, from the record in this Court, its jurisdiction is established by the test enunciated in *Live Oak* since "it affirmatively appears that in the court below there was duly drawn in question the validity of a statute of or an authority exercised under the state, because of repugnance to the Constitution, treaties or laws of the United States." (269 U. S. at 356.)

This Court's jurisdiction plainly appears from the Briefs and contentions of the parties in all the courts below and from the Opinions of the Court of Common Pleas and Court of Appeals. The opinion of the Court of Common Pleas (R. 371-380) makes specific reference to both Appellees' contention in that Court that the Federal Constitution and laws do not affect the validity of the Ohio Fair Trade Act. (R. 375.)

Both the Opinion and the Judgment of the Court of Appeals are replete with references to the Federal issues which were briefed and argued by the parties. (R. 380-406; 411-412.)

The ruling of the minority of the Judges in the Supreme Court of Ohio could not have been arrived at without overruling Hudson's arguments addressed to the Federal Constitution and statutes. Otherwise this ruling would have been in disregard of the specific requirements of Section 2505.21, O. R. C., *supra*, pp. 6-7.

Appellant has prepared an Appendix A referable to Upjohn, and an Appendix C, referable to Lilly (*infra*, pp. 42 to 80) drawn from the pleadings of record and the briefs of the parties in the Court of Common Pleas and in the Court of Appeals showing that each Federal question

was preserved in all Ohio Courts within the intendment and requirements of Ohio appellate procedure. Certified copies of such briefs have been deposited with the Clerk of this Court.

**III. IN CONTENDING THAT THE JUDGMENT BELOW WAS NOT "FINAL," UPJOHN RELIES UPON THE "STIPULATION," BOTH APPELLEES OVERLOOK THE OHIO STATUTE WHEREBY A COUNTERCLAIM IS WHOLLY INDEPENDENT FROM THE CAUSE OF ACTION IN A PETITION, AND DISREGARD THE IMPLICATIONS OF THE DECLARATORY JUDGMENT ACTION.**

Upjohn's second procedural contention concerns the finality of the judgment below. Upjohn's argument here, too, proceeds upon the theory that by "stipulation" (Upjohn Brief, 22, n. 12 at 24) the parties reserved the Federal issues for later adjudication.

With the removal from the case of any theory that the Federal issues were reserved for future determination, the contentions of both Appellees concerning the lack of finality of the judgment in the court below may be appraised in the light of the practice in Ohio with reference to cross-petitions or counter-claims.

There would appear to be little material difference between these terms in the Ohio Courts. Lowry, *Counter Claims or Cross Petitions in Ohio Practice*, 19 Cin. L. Rev. 316 (1950). Ohio has no mandatory counter claim practice. In *Horne v. Woolever*, 170 Ohio St. 178, 163 N. E. 2d 378 (1959), the Court noted the difference between the Ohio practice and that in other jurisdictions:

> "Where Rule 13 of the Federal Rules of Civil Procedure or a similar applicable rule or statute requires a defendant to assert a claim that such defendant has as a counterclaim in an action, such rule or statute has the effect of making such action an action based upon not only the cause of action asserted in the pe-

tition but also the cause of action that should have been asserted by way of counterclaim." (170 Ohio St. at 181.)

The Court then noted that in Ohio there is no requirement for compulsory counterclaims comparable with that provided for by Rule 13, F. R. C. P. On the contrary, Section 2309.35, O. R. C. provides:

> "At any time *before the final submission of a cause*, on motion of the defendant, the court may allow a counterclaim to be withdrawn, and it may become the subject of another action. On motion of either party, to be made at the time such counterclaim is withdrawn, an action on it shall be docketed and proceeded in without process. The court shall direct the time and manner of pleading therein. If any action is not so docketed, suit may be brought as in other cases." (Italics added.)

While the determination of "finality" is the province of this Court, it is submitted that the Ohio practice is persuasive in outlining the perimeter of the litigation below. Stern and Gressman, *Supreme Court Practice* (3rd Ed., 1962) 75 to 76.

When Judge McNeill in the Court of Common Pleas suggested to the parties that they proceed solely upon the petition for declaratory judgment and the answer thereto, the parties understood and acted upon his suggestion in the light of established Ohio practice—namely, that the law suits presented by the petitions and responsive pleadings on the one hand, and by the cross-petitions and the answers thereto on the other, were separate and severable. If indeed this were not the case, an appealable "final order" under Ohio appellate practice could not have resulted.

Not once prior to the filing of the respective Briefs for the Appellees in this Court has any suggestion been made

by any counsel for Upjohn that the Federal issues presented upon this or any prior appeal were precluded by lack of finality.* It would, therefore, seem clear that both by the Ohio practice and the stipulation before the trial judge, the respective orders appealed from achieved "finality."

Appellees also do not relate the issue of finality to the purpose of the declaratory judgment statutes. The within actions are declaratory judgment actions. The purpose of the Uniform Declaratory Judgments Act (O. R. C., Sections 2721.01-2721.15) would be disserved by this Court's acceding to Upjohn's argument that there will not be "any irreparable harm to Hudson if the Court dismisses the appeal and determines that the raising of any Federal question now is premature." (Upjohn Brief, p. 23.) Hudson might well be put out of business by injunction before the constitutional issues were finally determined on the cross-petition.

It is the purpose of the declaratory judgment action to assist parties to determine their rights as expeditiously as possible. The difficulty with the issue of constitutionality in the Ohio courts is evident not only from the conflicting results below, but from the judgment in the cases at bar by a minority of the Judges in the Supreme Court of Ohio.** It is, therefore, urged that the policy of

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* In the Supreme Court of Ohio, for example, the Upjohn Brief, at pages 65 to 69, discussed the relationship of Federal issues to the constitutionality of the Ohio Fair Trade Law under the heading:

"G. Acts of Congress and their interpretation by Federal Courts have no bearing upon the constitutionality of the Ohio Fair Trade Act."

The Lilly Brief in the Ohio Supreme Court also argued the Federal issues at pages 57 to 60.

** Of the sixteen Judges in the Ohio courts who have ruled upon the constitutionality of the 1959 Fair Trade Act, five have sustained it.

the declaratory judgment procedure, both state and federal, be furthered by this Court's continued giving to such judgments the status of finality. *Nashville C. & St. L. Ry. v. Wallace*, 288 U. S. 249 (1933); Baskey, *Finality of State Court Judgments under the Federal Judicial Code*, 43 Col. L. Rev. 1002, 1014, n. 48 (1943).

## IV. IT IS THE PROVINCE OF THE FEDERAL COURTS TO DETERMINE WHETHER STATE LEGISLATION PURSUANT TO A FEDERAL ENABLING ACT HAS CREATED AN ANTITRUST EXEMPTION FOR AN OTHERWISE ILLEGAL PRICE FIXING ARRANGEMENT WITH WHICH APPELLEES DEMAND APPELLANT CONFORM.

Upjohn takes the position that none of the questions presented raises "a real issue" with respect to the Federal law or Federal Constitution (Upjohn Brief, pages 16 to 19; pages 33 to 52). The Lilly Brief (14-18; 33-68) charges that Hudson "specifically challenges only a few provisions of the Ohio Act, none of which are applicable to the facts of this case."

The premise for these contentions lies in an unwarranted narrowing and limitation of the legal issues before this Court. Appellees' premise is that a *further construction* of the Ohio statute by the Ohio Supreme Court is required to resolve any ambiguities of interpretation (Upjohn Brief, 16, 33; Lilly Brief, 28, 36).

Appellees overlook the fact that the Ohio Supreme Court *has passed upon and overruled* all Federal constitutional objections. Upjohn would also have this Court disregard the fact that in a State where a nonsigner clause is wholly ineffective, a new fair trade act drawn upon the theory of the ineffectiveness of the nonsigner clause is now sought to be made effective against a nonsigner. Upjohn would have this Court disregard the source and kind of

statute by which this result is sought to be achieved following the overruling by the State Supreme Court of all Federal constitutional objections.

**A. Appellees' premise for ascertaining the validity of the Ohio Fair Trade Law denies to the Federal Courts the construction of federal exemptions from antitrust.**

Appellees' requirement of *additional construction* of the Act by the Ohio Supreme Court cannot be reconciled with the consistent holdings of this Court that:

(a) Upon the assertion of antitrust illegality by the Department of Justice, administrative agency, or aggrieved private party, the scope of an alleged exemption from antitrust is a Federal issue, for construction by the Federal courts;

(b) It is the province of the Federal courts to determine whether state legislation or marketing arrangements pursuant thereto are within the legislative or marketing arrangements envisaged by the Federal enabling provisions for the claimed exemptions from the operation of the Anti-Trust laws.

**1. Fair Trade Legislation and Marketing Practice.**

In *Schwegmann Brothers vs. Calvert Distillers Corp.*, 341 U. S. 384 (1951), this Court noted the "critical differences" between Louisiana's law and the Miller-Tydings Act. The Court construed the scope of the exemption as "a limited immunity," and compared the enabling legislation with the Louisiana statute (341 U. S., at 387, 388).

When the Louisiana statute, thus appraised, was found wanting, the enforcement of the "marketing arrangement" thereunder was refused, since "this interstate marketing arrangement would be illegal, would be

enjoined, that it would draw civil and criminal penalties, and that no court would enforce it," (341 U. S., at 386).

The technique for comparing statute and marketing practice was further refined by *United States v. McKesson & Robbins, Inc.*, 351 U. S. 305 (1956), where this Court clarified the import and purpose of Section 5 (a) (5) of the McGuire Act and the strict construction required of price fixing enabling legislation.

**2. Liquor Control by the States.**

In *United States vs. Frankfort Distilleries, Inc.*, 324 U. S. 293 (1945), the principal issue before this Court was "whether the state's power to control the liquor traffic within its boundaries makes the Sherman Act inapplicable" (324 U. S. at 297). Although the majority opinion found that the Twenty-first Amendment to the Constitution "bestowed upon the state broad regulatory power over the liquor traffic within their territories," it did not give the states "plenary and exclusive" power to regulate the conduct of persons doing an interstate liquor business outside Colorado. (324 U. S. at 299.) The Court held that the Sherman Act "is not being enforced in this case in such a manner as to conflict with the law of Colorado" (324 U. S. at 664).

The concurring opinion saw the question in the case as "whether in fact the policy of Colorado sanctions such an arrangement as the indictment charges." (324 U. S. at 301.) While the concurring opinion further noted that "it is precarious business for an outsider to be confident about the legal policy of a State," neither the majority of this Court nor the concurring Justices suggested that the issue be sent back to the Supreme Court of Colorado for decision of the impact of Colorado statutes on Federal law.

In subsequent litigation putting in issue the relationship between state liquor policy and the federal antitrust laws, the Federal courts have uniformly resolved for themselves the issue of the possible pre-emption of Federal anti-trust statutes by state enactments under the Twenty-first Amendment, and the effect and scope of state policy. *Washington Brewers Institute vs. United States*, 137 F. 2d 964 (C. A. 9, 1943), *cert. den.*, 320 U. S. 776 (1943); *United States vs. Maryland State License Bev. Assn.*, 138 F. Supp. 685 (D. Md., 1956) *rev'd on other grounds*, 240 F. 2d 420 (C. A. 4, 1957); *United States vs. Erie County Malt Beverage Dist. Assn.*, 264 F. 2d 231 (C. A. 3, 1959).

**3. The McCarran-Ferguson Act and the Insurance Exemption.**

In *F. T. C. vs. Travelers Health Assn.*, 362 U. S. 293 (1960), this Court construed Nebraska insurance regulatory legislation to determine whether the exemption from Federal regulation afforded under the phrase "regulated by State law" in Section 2(b) of the McCarran-Ferguson Act, had been conferred by the Nebraska legislation. The Brief of the Federal Trade Commission (Page 10) states the position resolved in its favor by this Court:

> "Our contention is simply that the state regulation intended to displace existing federal legislation outlawing deceptive practices in interstate commerce channels is regulation by the state where the deception is practiced and has its impact."

Again, this Court did not remand the case for construction of the Nebraska statute by the Nebraska Supreme Court to ascertain the scope of Nebraska's power over "the practices of an insurance business affecting the residents of every other State in the Union," (362 U. S. at 302), nor "the impediments, contingencies and doubts which constitutional limitations might create as to Ne-

braska's power to regulate any given aspect of extra-territorial activity * * *." (Ibid.)

The reasoning of *Travelers* was applied in a rate-fixing investigation under the Sherman Act. *In re Aviation Insurance Industry*, 183 F. Supp. 374 (S. D. N. Y., 1960).

It follows from the foregoing that by invoking the necessity for *further* interpretation by the Ohio Supreme Court, Upjohn is seeking to oust the Federal courts of their normal and customary function in determining whether the Ohio legislation has created a valid exemption for the price fixing arrangements now sought to be enforced.

**B. The provisions of the 1959 Ohio Fair Trade Act are on their face wholly outside the permissible scope of the Miller-Tydings and the McGuire Acts in that the Ohio statute creates an unlawful marketing arrangement in commerce with a "patch" of contract-language pricing provisions.**

Upjohn joins with Hudson in its appraisal of the basic premise applicable to this case. As Upjohn states:

> "The problem [in *Travelers*] is the same [as in the case at bar] in that this Court must seek the basic purpose of Congress in enacting the McGuire Act." (Page 49.)

The purposes of the Miller-Tydings and McGuire Acts are plain. As *McKesson & Robbins, Inc.* held:

> "We are to take the words of these statutes 'in their normal and customary meaning.' " (351 U. S. 311 to 312.)

State legislation which goes beyond the "normal and customary" scope and construction of the provisions of the Federal enabling legislation creates and seeks to maintain unlawful transactions in commerce in violation of Sec-

tion 1 of the Sherman Act. This is the plain teaching of *Schwegmann* and *McKesson*.

There are "critical differences" between the provisions and purposes of the 1959 Ohio Fair Trade Act and the Federal enabling statutes. In contrast with the few provisions of the 1936 Ohio Fair Trade Law (Sections 1333.05-1333.08) which conform with the few provisions of the McGuire Act, it is plain that the provisions of the 1959 Ohio Act contemplate the "organization of the market" along the lines indicated in Hudson's main Brief.

The statutory purpose expressed in Section 1333.27 (B), taken practically verbatim from 1959 proposed Congressional legislation, is forthright. The Ohio statute seeks the establishment of "fair, equitable and competitive prices * * * in all appropriate stages in the distribution of * * * identified merchandise." The statutory vehicles to achieve this purpose include "horizontal" third party beneficiary contract provisions, permissive price fixing provisions at dual distribution levels in violation of Section 5(a)(5) of the McGuire Act and the *McKesson & Robbins* doctrine; and provisions for the limitation of channels of distribution and marketing practices by sellers, distributors and their subvendees.

**1. The McKesson Issue.**

Question 1(a) (the *McKesson issue*) bears directly upon the constitutionality of the Ohio Act in that Section 1333.29(A) expressly authorizes what Section 5(a)(5) of the McGuire Act prohibits.

Upjohn appears clearly to have utilized this provision of the Ohio law in its *del credere* marketing arrangement. As page 47 of the Brief for the United States in *United States v. McKesson & Robbins, Inc.*, 351 U. S. 305 (1956),

pointed out, this Court in *United States v. Masonite Corp.*, 316 U. S. 265, 280, note 4 "rather plainly implies that the Miller-Tydings Act * * * would * * * fail to confer immunity upon a price fixing agreement between the " 'principals' and a competing 'agent.' "

The evidence in this case fully discloses the competition between McKesson & Robbins, Inc., the *del credere* agent, and Upjohn in sales to retailers. Appendix A, *infra*, p. 44. Similar *del credere* agency arrangements were in effect with other wholesalers. (R. 88.) Upon its face and on account of the marketing practices condoned, the Ohio Fair Trade Act is unconstitutional. It conflicts with the McGuire Act and Section 1 of the Sherman Act and hence violates the Supremacy Clause.

**2. The "horizontal price agreements" and "horizontal boycott" issue.**

It is equally clear that Par. 6 of the Lilly Manufacturer-Retailer Fair Trade Contract constitutes, prohibiting sales by a retailer to a price-cutter, a boycott within the intent of this Court's ruling in *Fashion Guild v. Fed. Trade Commission*, 312 U. S. 457 (1941). It is the common understanding of the profession that such clauses in or out of fair trade agreements are unlawful and in violation of Section 1. Barber, *Refusals to Deal Under the Federal Anti-Trust Laws*, 103 U. of P. L. Rev., 847, 856, n. 40; Harper, *Essentials and Embellishments of the Fair Trade Contract*, The Basis and Development of Fair Trade (The National Wholesale Druggists' Association, 3rd Ed., 1955) 97.

There is nothing in the McGuire Act to authorize a provision like Section 1333.29 (B) (2) which, in a different form of words, authorizes the kind of restriction of a buyer embodied in the Lilly contract.

Lilly defends such provisions on the grounds that Par. 6 is merely a "method of insuring a non-discriminatory resale price maintenance program and enforcing observance of the fair trade prices by persons already obliged to observe them." (Lilly Brief, at 38). The enforcement provisions of the "non-signer" clause of McGuire, Section 5(a)(3), are invoked in support of the collective action. A "non-discriminatory enforcement and observance" of the Fair Trade laws is further seen as aiding the Congressional intention in enacting McGuire in 1952 to permit state fair trade laws "to apply in their totality." (*Ibid.*) A retailer complying with the fair trade law is not to be permitted "to aid and abet its violation by others." (Lilly Brief, at 40).

The Lilly brief thus gives full support to the Hudson charge that the aim and objective of the Fair Trade Law of Ohio is to prevent the "diverting" of "fair-traded" merchandise. *The McGuire Act says nothing about such an objective.* When, therefore, Hudson is required by the Lilly notice (Lilly Record, 18) to conduct its operations "in accordance with the obligations under the contracts," and "under the Ohio Fair Trade Act," it is asked to join the boycott.

The few simple vertical price maintenance provisions of Section 5(a)(2) of the McGuire Act scarcely can be found to encompass Lilly's objective. And Lilly's offer to let a retailer "fight his way" out of the unlawful boycotting provision of Paragraph 6 of the Lilly contract (Lilly Brief, footnote, p. 38) is scarcely a satisfactory alternative to a valid exemption from anti-trust. Cf. *F. T. C. v. Travelers' Health Ass'n.*, 362 U. S. 293, 302 (1960).

**3. The "notice" issue.**

As the discussion of the "notice method" of setting resale prices in the next section shows, by means of a "notice" of a "proprietary interest," the Ohio statute seeks to provide the vehicle for obliterating distinction between a "signer" and a "nonsigner" that has brought on many rulings like *Bargain Fair*. All persons are now "contractors." The "signer" and "nonsigner" provisions of the Federal statutes are sought to be effectively discarded.

Persons like Hudson, who have the right to be free from the "nonsigner" provisions of Section 5(a)(3) of the McGuire Act, because it is against the constitutional law and policy of the State of Ohio to create or enforce fair trade agreements against nonsigners, are now told that they are bound "on contract principles." Brief *Amici Curiae* of *Corning Glass Works, et al.*, at 8.

Appellees make no reference to the two hundred (200) pages of the legislative history of the Ohio statute as it appears in the Record; nor do Appellees discuss the antecedents of the 1959 Ohio Act, such as the various Harris Bills and the MacLachlan proposals.

In fact, Upjohn seeks to discourage such inquiry by arguing that Hudson looks to "elaborate discussion of Congressional activity subsequent to the enactment of the McGuire Act * * * An unsuccessful subsequent attempt to broaden fair trade legislation is not a part of the 'legislative' history of the McGuire Act, whether or not bills are reported out or hearings held." (Upjohn Brief, at 48.) Similar argument made by Lilly. (Lilly Brief, 54-55).

Appellees mistake the purpose of Hudson's inquiry into the congressional fair trade legislation subsequent to the McGuire Act. The purpose of such inquiry is to establish the origins and purpose of the practically identical 1959 Ohio legislation. Such is also the purpose of the com-

parison of the 1959 Ohio legislation with the 1958 Virginia legislation.

The comparison clearly establishes that an unlawful marketing system has been proposed by the Ohio Legislature which is in derogation of, and designed to be substituted for legislation conforming with the McGuire Act. The pricing provisions of the Ohio legislation are a mere "patch" of contract-language upon the "proprietary interest" proposals of the Harris Bill. Where legislation is patently and on its face beyond the limits of Federal exemptions from antitrust, the Federal courts will so declare at the instance of regulatory agencies, the Department of Justice, or private persons adversely affected thereby.

Appellees contend that this Court's ruling must be delayed until the Ohio Supreme Court has definitively interpretcd the statute.

Appellees rely upon cases like *Alabama State Federation of Labor v. McAdory*, 325 U. S. 450 (1945) and *Rescue Army v. Municipal Court*, 331 U. S. 549 (1947). Neither case involves the applicability of Federal law by reason of failure to conform with Federal enabling exemptive legislation. Moreover, the Supreme Court of Ohio has overruled all Federal constitutional objections. Additionally, the Ohio 1959 Fair Trade Act is scarcely of doubtful construction. Its scope and meaning plainly appear on its face. This plain purpose, motivation and construction have been confirmed by the Ohio legislative hearings incorporated in the Record, and by the extensive congressional hearings on the MacLachlan proposal and Harris Bills, and the Committee Report on the Harris Bill.

**V. THE "NOTICE CONTRACT" PROVISIONS OF THE OHIO FAIR TRADE LAW ARE CONTRARY TO THE CONGRESSIONAL INTENTION IN ENACTING THE "CONTRACTS AND AGREEMENTS" PROVISIONS OF SECTION 5(a)(2) OF THE McGUIRE ACT. THE PREMISE OF OHIO LAW THAT A FAIR TRADE CONTRACT IS NEITHER VALID NOR ENFORCEABLE AGAINST A "NON-SIGNER" NULLIFIES THE CONDITION FOR ENFORCEMENT AGAINST A "NON-SIGNER" PURSUANT TO SECTION 5(a)(3) OF THE McGUIRE ACT.**

Apart from the "critical differences" between the "market organization" plan provided by the 1959 Ohio Act and the Federal enabling legislation, the "notice contracts" sections of the act cannot lawfully be applied to Hudson.

Ohio's objective was to take over the Congressional job of curing the constitutional weaknesses of the non-signer clause. The technique for this objective was to repeal the "contracts or agreements" provisions of Section 5(a)(2) of the McGuire Act by authorizing the "proprietor" of a mark to establish minimum resale prices binding upon "non-signers" by mere notice to distributors—whether such notice be of the price of the trademarked commodity, or of a third party's contract concerning the trade-marked commodity.

As the legislative history of the Ohio Act and the minority opinion in the Supreme Court of Ohio make plain, this is the "implied contract" doctrine.

Upjohn's position upon this issue is summarized at page 45 of its Brief. The propositions there contended for by Upjohn are:

1. If the implied contract between Hudson and Upjohn is included in the phrase "contracts or agreements" in Section 5(a)(2) of the McGuire Act, it is lawful for Up-

john to enforce such contracts or agreements against a person who is a "party" to such contract or agreement under Section 5(a)(3).

2. An implied contract to bind non-signers is now a legally enforceable contract in Ohio and Virginia.

3. *This Court must look to state law* to see whether the implied "contract or agreement" between Hudson and Upjohn qualifies under Section 5(a)(2) of the McGuire Act.

4. Since notice plus "purchase and use of a proprietor's brand-named products" creates a valid contract under Ohio law, it is enforceable against a "party to such a contract" under Section 5(a)(3).

Lilly's position is closely parallel.*

*Appellees' position masks the basic premise of the Ohio law that a nonsigner provision is inoperative against Hudson, and the basic premise of Federal law that a notice does not make Hudson a "party" to a contract within the meaning of Section 5(a)(2).*

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* The Lilly Brief (pp. 42-55) emphasizes a number of questionable premises: a. The McGuire Act should apply to whatever contract state law might recognize as lawful. b. What contracts are lawful as applied to intrastate transactions are matters for the States to determine. c. The "proprietary interest" conception of Section 1333.31 is simply a legislative reflection of *Old Dearborn Distributing Co. v. Seagram Distillers Corp.*, 299 U. S. 183 (1936). d. Section 5(a)(3) permits enforcement of the legislatively created "notice contract."

**A. The Upjohn Brief masks the basic premise of Ohio law that a "non-signer" clause is invalid and may not be enforced in the State of Ohio.**

The legislative history of the 1959 Act is replete with evidence that the Legislature of Ohio intended to abide by the holding of *Union Carbide & Carbon Corp. v. Bargain Fair, Inc.*, 167 Ohio St. 182, 147 N. E. 2d 481 (1958) that the non-signer clause is invalid in the State of Ohio.

The spokesman for the Act stated to the Legislature that (R. 209):

> "* * * the Supreme Court * * * apparently objected to a person being bound by the provisions of a contract to which he has in no way been a party. The Court in no way cast any doubt as to the validity and enforceability of a contract between a producer and a distributor providing minimum prices if the distributor was a party to that.
>
> "Does House Bill 318 answer the Court's constitutional objection? We think it does."

The Brief *Amici Curiae of Corning Glass Works, et al.*, filed in this Court, with the Ohio legislative spokesman, Mr. James A. Gorrell as Counsel, further explains at page 32 that "in enacting the new Ohio Fair Trade Act, the Ohio Legislature decided to *shift the emphasis from the non-signer concept and to develop contractual rights and obligations* between the proprietor of a trademark or trade-name and the retailer desiring to use that mark in the sale of products." (Italics added.)

The Supreme Court of Ohio carefully omitted to overrule *Union Carbide*.

**B. The congressional modification of the *Schwegmann* decision was solely by means of the "nonsigner" amendment to Section 5(a)(3) of the McGuire Act. Since the nonsigner clause is invalid in the State of Ohio, Section 5(a)(3) has no relevance to this case. Congressional sanction for making Hudson a "party to a contract" may be derived solely from Section 5(a)(2).**

The "Section by Section Analysis" of the House Committee Report H. Rep. No. 1437, 82nd Cong., 2nd Sess. (1952) at 6 analyzes Section 5(a)(3) to show that Section 5(a)(3) was the vehicle for reaching the "nonsigner."

> "Paragraph (3).—This is a new paragraph, covering the situation presented in the *Schwegmann* case referred to above. It provides that neither the Federal Trade Commission Act nor the antitrust acts shall render unlawful the exercise or the enforcement of any right or right of action created by any law or public policy of any State, Territory, or the District of Columbia which provides that willfully and knowingly advertising, offering for sale, or selling any commodity at less than the prices prescribed in such *contracts*, whether the person so advertising, offering for sale, or selling is or is not a party to the *contract*, is unfair competition and is actionable at the suit of any person damaged thereby."

The legislative history of Section 5(a)(3) leaves no room for the contention that Section 5(a)(3) is a source of the power to "contract" pursuant to Section 5(a)(2). Upjohn makes no reference to the "acrid controversy" which filled 143 pages of the Congressional Record. (98 Cong. Rec., Part IV, 4896-4926; 4933-4956; 98 Cong. Rec., Part VII, 8716-8748; 8819-8858; 8865-8873; 8881-8892.)

As Mr. Reed of Illinois stated:

> "Mr. Speaker, it is quite apparent that among the Members of the House there are three schools of thought on this legislation. Some favor the McGuire bill, some the Keogh bill, and some do not favor any kind of fair-trade legislation whatsoever." (98 Cong. Rec., Part IV, page 4898.)

By the time this three-way controversy was finished, Mr. Priest, the Chairman of the Committee on Interstate and Foreign Commerce, which submitted the Committee Report, stated to the House:

> "We need legislation that will permit the States' fair trade laws to operate as they did operate from 1937 until May, 1951, when the Supreme Court ruled in the Schwegmann case. We need that law, in my opinion, as soon as possible." (98 Cong. Rec., Part IV, at 4947.)

Appellees thus may not view the nonsigner provision as a source for finding a contract under Section 5(a)(2).

**C. The recipient of a notice of the price of a trade-marked article, or of another's resale price maintenance contract does not become a party to a "contract or agreement prescribing minimum or stipulated prices" within the "normal and customary" meaning of Section 5(a)(2) of the McGuire Act, since the consensual requirement intended by Congress for a "contract or agreement" is wholly lacking.**

There is no suggestion in the entire legislative history that the states were to be free to adopt measures without regard to the limits and guide-lines indicated by Congress. This conclusion is reinforced by the "Section by Section Analysis" of the McGuire Bill.

This "Analysis" clearly shows that "contracts and agreements" in the sense of "contracts" was what the

Committee intended. In discussing Section 5(a)(2), the Committee Analysis refers to a "contract" lawful under State law, and *to a "contract" which requires a vendee to enter into another contract*:

> "Paragraph (2).—With the two exceptions referred to below, this paragraph contains substantially the same provisions as those contained in the first proviso of the Miller-Tydings Act. In substance, this paragraph provides that neither the Federal Trade Commission Act nor any of the antitrust acts shall make unlawful a *contract* prescribing minimum or stipulated prices for the resale of a trademarked commodity in open competition with other commodities when such a *contract* is lawful under applicable State law. This paragraph differs from the Miller-Tydings Act in two respects. First, it includes a provision expressly covering *contracts* which prescribe "stipulated" prices; such *contracts* are not expressly covered by the Miller-Tydings Act. Second, it includes a provision expressly covering a *contract which requires a vendee to enter into another contract* prescribing a minimum or stipulated price; such a *contract* is not expressly covered by the Miller-Tydings Act."

In the "normal and customary meaning" of the words of the McGuire Act, the Ohio statute does not create a "contract or agreement" between Hudson and Upjohn by the mere fact of a price notice prior to the purchase of Upjohn products by Hudson from a wholesaler in Michigan in the course of interstate commerce. It is a highly questionable proposition of law that notice of (i) a retail price for A's trade mark (ii) upon an article owned by B, the wholesaler, and (iii) sold by B to C, the retailer, creates a "contract or agreement" between A and C.

A "notice" is not a "contract or agreement." Neither is a notice of the price on a trade-marked item in the

course of interstate commerce. Neither is a notice of a third party's contract to maintain the price of a trade-marked item. 1 *Williston, Contracts* (3rd Ed. 1957), Section 90E, points out that "if the ultimate purchase is not from the offeror, but from one who has acquired from him absolute and unqualified ownership, it would seem impossible to treat the purchase of the property as consideration for a promise of the purchaser to the original seller, unless at least the facts warranted the assumption that the immediate seller demanded as part of the consideration of the sale a promise to the original seller."

A notice device may cure the failure of the "non-signer clause" if effect is given solely to the Ohio legislative fiat without regard to the Federal enabling law. The notice device will not, however, accomplish a transmutation of the notice device into a "contract or agreement" within any normal and customary meaning of Section 5(a)(2). The purpose of Section 5(a)(3) was to provide the vehicle for enforcement against "non-signers."

**D. The content of "contract and agreement" in this Federal statute is for Federal definition, not for definition and alteration by the State of Ohio.**

The construction of Federal exemption from anti-trust is a Federal function. If the "notice" herein contended for created a "contract" between Hudson and either of the Appellees, then the interpretation of "contracts or agreements" contended for by Appellees would give the State unlimited power to affect interstate commerce in ways neither intended nor envisaged by the Congress by a State's attempting to exempt from anti-trust price-fixing "intrastate transactions" under "any statute, law, or public policy now or hereafter in effect in any state * * *."

If Appellees are correct in their contention, then the State of Ohio can, as it has done here, arbitrarily place a label upon any price-fixing transaction in the "nature" of a contract in connection with a trade-marked or trade-named commodity and call it a "contract or agreement" for purposes of McGuire.

It is also readily apparent that as soon as the State of Ohio attempts such legislation and seeks to enforce it, then Ohio has destroyed the basic premise of this Court in defining the permissible scope of fair trade legislation. Before the enactment of the McGuire Act, this Court held:

> "A distributor of a trade-marked article may not lawfully limit by agreement, expressed or implied, the price at which or the persons to whom its purchaser may resell, except as the seller moves along the route which is marked by the Miller-Tydings Act."
>
> *United States v. Bausch & Lomb Co.*, 321 U. S. 707, 721 (1944).

After the enactment of the McGuire Act this Court in *McKesson & Robbins*, reiterated both the rule of *Bausch & Lomb* and emphasized the rule of strict construction of resale price maintenance legislation since it creates a "privilege restrictive of a free economy." 351 U. S. 305, 316.

Once the State of Ohio is empowered to redefine the permissible scope and extent of "contracts and agreements," then the door is open for the State to impose any sort of burden upon transactions in commerce and in derogation of anti-trust policy and any other national policy under the commerce clause.

The 1959 Ohio Fair Trade Law, with its concept of "proprietary interest," plainly and adversely affects the transfer of trade-mark provisions in the Lan-

ham Act,* and the labeling provisions of the Pure Food & Drug Act.** Such legislation, with such objectives, is clearly the province of Congress.

It is fallacious for Appellees to argue that Section 5(a)(2) of the McGuire Act authorizes the States to inject a new interpretation of "contracts or agreements prescribing minimum or stipulated prices," because the Federal anti-trust laws are by that section made inapplicable to "contracts or agreements of that description" which "are lawful as applied to intrastate transactions." "Any contracts or agreements" cannot mean any "*kind*" of contracts or agreements.

The resulting power to trench upon the Federal regulation of interstate commerce would be unlimited.

In 1952, as in 1937, Congress was writing legislation to accommodate the then State Fair Trade laws. The contour and pattern of such laws was clearly apparent to the Congress. If the legislation now sought to be justified by

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* The assignment of federally registered marks is controlled by 15 U. S. C. A., Section 1060, which provides in pertinent part:

"A registered mark or a mark for which application to register has been filed shall be assignable with the *goodwill of the business* in which the mark is used, or with that part of the *goodwill of the business* connected with the use of and symbolized by the mark, and in any such assignment it shall not be necessary to include the *goodwill of the business* connected with the use of any symbolized by any other mark used in the *business* or by the name or style under which the *business* is conducted." (Italics supplied.)

** The "repackaging or otherwise changing the container, wrapper, or labeling of any drug package in furtherance of the distribution" to the ultimate consumer has, by statute enacted Oct. 10, 1962, been included in the terms "manufacture, preparation * * * or compounding," 21 U. S. C. A. Sec. 360(a)(1), Pub. L. 87-781, Title III, Sec. 302, 76 Stat. 794; Sen. Rep. 1744, 87th Cong., 2d Sess. (1962) 2.

The invitation of Section 1333.33(D) to remove "all trace" of trademarks would require Hudson's prior registration and periodic inspection by the Department of Health, Education and Welfare.

the State of Ohio is referable to the McGuire Act, "we could conclude that Congress carved out the vast exception from the Sherman Act now claimed only if we were willing to assume that it took a devious route and yet failed to make its purpose plain." *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U. S. 384 at 395.

**E. The legislative history of the McGuire Act affords no basis for a construction of the Ohio statute which would obliterate the distinction between Section 5(a)(2) and Section 5(a)(3) of the McGuire Act, dealing respectively with "signers" and "non-signers."**

While the "notice contract" theory of the Ohio Act is derived from the 1958 Virginia law, the remaining substantive provisions and objectives, including the "notice" of "proprietary interest," are derived from the theory of the proposed 1958 Congressional fair trade legislation. This legislation was to be curative of the breakdown of fair trade enforcement by means of the "non-signer clause."

As House Report No. 467, 86 Cong., 1st Sess. (June 9, 1959) explains:

> "This proposed Federal fair trade law (Pars. (5) through (10) of the reported bill) would give the proprietor of a trade mark, brand or trade name the option to fair trade his merchandise, if it is in interstate commerce, or held for sale in any State, the District of Columbia, and Territory of the United States after moving in interstate commerce, *thereby restoring the opportunity to provide for effective resale price maintenance in the 16 States where fair trade laws have been declared unconstitutional in whole or in part,* and creating the opportunity for him to provide for resale price maintenance in the States of Alaska, Missouri, Texas, and Vermont, and the District of Columbia which never enacted such laws." (Italics added.)

It would, therefore, seem plain that the purpose of the 1959 Ohio Act is not to create "contracts and agreements" within the meaning of the McGuire Act, but to create a wholly new approach which would be curative of the State constitutional weaknesses in fair trade enforcement, produced in over twenty-three states by the distinction between the "signer" and "non-signer" of "contracts or agreements" in Sections 5(a)(2) and 5(a)(3) of the McGuire Act.

The latest ruling of "nonsigner" unconstitutionality was by the Pennsylvania Supreme Court in *Olin Mathieson Chemical Corporation v. White Cross Stores, Inc., No. 6, et al.*, 1964 Trade Cases, Par. 71,067 (March 26, 1964).

**F. The Virginia courts, in construing the legislation upon which the Ohio "notice contract" provisions are based, have refused to construe the corresponding provisions of the Virginia statute to bind Hudson where Hudson has at most notice of a third party's contract with the "proprietor." Such enforcement would be contrary to the State's policy of non-enforcement of the "non-signer" clause. Hence, the essential condition for application of Section 5(a)(3) of the McGuire Act is absent.**

The "non-signer" clause is inapplicable to fair trade legislation in Ohio. *Bargain Fair* so held. The Legislature accepted this premise in enacting the 1959 Fair Trade Law.

As stated in the Brief of Appellant, the only clarity in the Ohio picture is that the 1959 Ohio Fair Trade Act does not reenact the non-signer provisions of the 1936 Act (O. R. C. Sections 1333.05-1333.08).

The interpretation of the notice contract provisions of the Virginia Fair Trade Law, which is the model for the

Ohio statute, also supports Hudson's contention that it is not a "party" to an implied contract with Appellees.

In refusing enforcement of the "notice contract" upon facts parallel with those at bar, the Virginia Courts hold that "* * * the receipt of the commodity from a source other than the manufacturer cannot be deemed an acceptance by the respondent, for the respondent was not a party to the agreement or in privity with either of the parties, and the Fair Trade Act is limited to voluntary agreements. To hold otherwise would be to write into the law that which has been removed from it, to-wit: the 'non-signer' provision." *Bulova Watch Company v. Zale-Norfolk, Inc.*, Appendix B to Hudson Brief in Case No. 489, at 99.

The Ohio law, like the Virginia law, has had removed from it the "non-signer" provision. Any verbal differences in the "notice contract" provisions between the two statutes are immaterial.

It follows from the foregoing that there is a clear failure of the premise of Section 5(a) (3) of the McGuire Act. In the normal and customary meaning of "contracts and agreements," the Federal law precludes Hudson and Upjohn from being "parties" to an *implied contract.* The non-signer policy of Ohio, concurred in by Virginia, precludes enforceability of the notice to Hudson.

*There is therefore no "statute, law, or public policy" in effect in Ohio which makes actionable* the "offering for sale, or selling any commodity at less than the price or prices prescribed in such contracts or agreements *whether the person so advertising, offering for sale, or selling is or is not a party to such a contract or agreement."* The public policy of Ohio is explicitly to the contrary in connection with any attempted enforcement against Hudson or other non-party.

**G. The Ohio Statute violates the Supremacy Clause.**

The attempt by the Ohio Legislature to redefine "contract or agreement" so as to nullify the distinction between the "signer" and "non-signer" provisions violates the Supremacy Clause of the Federal Constitution. It is merely an attempt to repeal Sections 5(a) (2), (3), (4), and (5) of the McGuire Act. In line with the objectives sought by the 1958 Congressional legislation which furnished most of the source for the 1959 Ohio Fair Trade Act, the Ohio Act seeks to destroy the statutory scheme of the McGuire Act as envisaged by Congress and to cure all State constitutional infirmities arising out of the distinction between "signers" and "non-signers" by making "contractors" of every person handling trade-marked merchandise in interstate commerce.

**H. Severability is continually decried by Appellees as simply an issue of "State interpretation" of a statute. (e.g. Upjohn Brief, 52.)**

The Trial Court found the statute to be unitary and entire. There is no suggestion to the contrary in the rulings of the Court of Appeals, and of the Supreme Court.

The issue is of importance since the 1959 Act does contain valid elements; to wit, those still appearing in the 1936 or traditional type of Fair Trade Act *apart from the non-signer clause.* (O. R. C., Sections 1333.05-1333.08.)

The contention that "severability" is strictly an issue for the State Courts derives from a denial of the premise that compliance by state legislation with Federal enabling laws is a matter for determination by the federal courts, not by the State courts. Moreover, the precedent cited by Upjohn at page 52 of its Brief, *Dorchy v. Kansas,* 264 U. S. 286 (1924) has no relationship to federal enabling

legislation; but this case also recognizes the power of the Federal court as to make its own determination of severability. (264 U. S. at 291.)

**VI. BY CREATING A CONCEPTION OF A "PROPRIETARY INTEREST" IN A TRADEMARK SEPARATE FROM THE PRODUCT, WITHOUT THE AUTHORIZATION OF THE FEDERAL ENABLING LEGISLATION, THE 1959 OHIO LAW VIOLATES THE DUE PROCESS REQUIREMENT OF THE FOURTEENTH AMENDMENT. *OLD DEARBORN* WHICH DEALT SOLELY WITH LOCAL COMMERCE PRIOR TO ANY FAIR TRADE ENABLING LEGISLATION HAS NO RELEVANCE TO THIS CASE.**

Every petition and every brief filed by Hudson in these litigations has argued that the Fair Trade legislation accomplishes an unlawful deprivation of due process of law. The due process clause of the Federal Constitution is mentioned specifically in Hudson's petitions for declaratory judgment.

Both in the trial court and in the Court of Appeals, the due process issue was extensively briefed. The State and Federal constitutional provisions are specifically referred to, both in Hudson's Briefs in Support of Petition in the trial court, and in Hudson's Briefs as Appellee (Appendix A, *infra*, pp. 46, 52 and Appendix C, *infra*, p. 68).

In the Supreme Court of Ohio, Hudson's Brief of Plaintiff-Appellant extensively argued the due process issue (pp. 30-44). In connection with this issue, Hudson discussed the Federal concepts and precedents concerning the proper role and function of trademarks, the Federal and Ohio food and drug laws regulating misbranding in commerce, and the criticism by the Federal Departments, in connection with the Harris Bill, of the notion of a "proprietary interest" separate from the product. Hudson's

Reply Brief of Plaintiff-Appellant in the Supreme Court of Ohio (pp. 27-37) also extensively discussed the due process issue. Hudson argued the lack of power of the Ohio Legislature to create a "proprietary interest" in trademarks, and cited the limitations on the transferability of trademarks separate from goodwill imposed by the common law and the Lanham Act.

In every Brief in every Court Hudson also argued the failure of the Ohio fair trade law to give opportunity for notice and hearing before the legislative function of price-setting was exercised by private parties.

Thus every aspect of due process was argued by Hudson at every level in the courts below, with specific reference to the Federal statutes which might bear upon the concept of "proprietary interest" such as the Lanham Act, and the Federal Food, Drugs and Cosmetics Act; and reference was made to the position of the Federal Departments upon the concept of the severability of trademarks from product.

Disregarding the foregoing, Upjohn now argues to this Court that the due process question "was not discussed in Hudson's brief in the trial court and was abandoned in the Court of Appeals and the Ohio Supreme Court" (Upjohn Brief, p. 31). Lilly argues that *Old Dearborn* has settled the constitutional issue (Lilly Brief, 61-67). Both Appellees view the issues as foreclosed because, in their opinion, the action of the Ohio Legislature falls within the doctrine of *Ferguson v. Skrupa*, 372 U. S. 726, 730-731 (1963).

In taking this position, Appellees omit the qualifying phrase of the *Ferguson* case, that States might regulate their commercial and business affairs "so long as their laws do not run afoul of some specific federal constitutional

prohibition, or of some valid federal law." In this case, the enactment of the Ohio Legislature accomplishes *both* prohibited objectives, the violation of the Supremacy Clause and a number of Federal statutes.

Neither the "debt pooling" problem of *Ferguson*, nor the "right to work" issue in *Lincoln Federal Labor Union v. Northwestern Iron & Metal Co.*, 335 U. S. 525, 536 (1949) arose in the context of a state statute *which can achieve life only within the confines of a Federal enabling exemption from the antitrust laws.*

*Old Dearborn*, also relied upon by Appellees as divesting any due process issue from this case, was decided in 1936, and dealt solely with issues of due process under the Constitution of the State of Illinois in connection with transactions then construed to be intrastate. The invitation in *Old Dearborn*, 299 U. S. at 195, to the purchaser to remove "the mark or brand from the commodity—thus separating the physical property, which he owns, from the good will, which is the property of another—" was extended prior to the enactment of any of the federal legislation bearing upon the case at bar, let alone legislation like Ohio's which also seeks rights of regulation over business practices of Appellant.

The *Ferguson* and *Lincoln Federal* precedents relied upon by Upjohn have no correlation with supervening Federal enactments which created the fair trade exemptions from antitrust, and which regulate the "bundle of rights" in trade-marked commodities in the stream of interstate commerce.

The first of these "bundle of rights" would appear to be that no State may create for its citizens a "fair trade" exemption as the vehicle for "leveraging" the destruction of other rights created by other equally valid

Federal enactments. Congress in the Lanham Act has clearly indicated its intention to preempt the regulation of trademarks in commerce, including the conditions surrounding the transfer of trademarks in commerce. 15 U. S. C., Sections 1127, 1060. The trademark may not validly be divorced from the "good will" with which it is associated.

Nor may the right of a State to enact valid intrastate resale price maintenance legislation be utilized as the means of effecting the recall of the judicial decisions of this Court defining the proper area within which businessmen may assert rights to trademarks after commodities bearing the mark have left their ownership and control and have been resold to third parties in commerce

*Champion Spark Plug Co. v. Sanders*, 331 U. S. 125 (1947);

*Prestmettes, Inc. v. Coty*, 264 U. S. 359 (1924).

Lilly concedes the plain repugnance of the Ohio law to established doctrines of trademark infringement. "Obviously, Lilly could not treat Hudson as a tort-feasor if Hudson exercised its right to substitute the label for Lilly's." (Lilly Brief, at 60.)

Moreover the Federal antitrust enabling exemption for fair trade legislation does not authorize a State, by such legislation, Sec. 1333.33(D) to require people to remove drug labels to avoid "fair trade" and thereby to defeat the policy expressed in the Federal Food, Drug and Cosmetic Act. 21 U. S. C. A., Sections 301, [redacted], *et seq.*

The action of the State of Ohio in attempting to define and maintain a "proprietary interest" by a manufacturer in the hands of a subvendee finds no precedent in trademark law. It also finds no precedent in the words of the

Miller-Tydings or the McGuire Acts. It is merely a bold, arbitrary taking of property in the interest of price maintenance, contrary to the principle that State power is here derived not from the state constitution—as in *Ferguson* and *Lincoln Federal*—but from Federal enabling legislation.

When the State of Ohio steps beyond the express confines of the Federal enabling legislation, to authorize price-fixing in commerce, it would seem clear that any claimed protection afforded by the "economics" or "police power" of fair trade falls away. The action of the State has then, in the words of *Ferguson*, run afoul of "some specific federal constitutional prohibition, or of some valid federal law."

It is therefore urged that this Court reconsider *Old Dearborn*, not in the intrastate context as originally posed, but rather in the light of the various aspects of interstate commerce which have intervened since 1936.

## CONCLUSION.

Appellant prays that this Honorable Court, in the exercise of its jurisdiction pursuant to 28 U. S. C., Section 1257(2), reverse the judgment of the Supreme Court of Ohio, and declare, for the reasons herein set forth, that Ohio Rev. Code, Sections 1333.27 through 1333.34 is unconstitutional by reason of conflict with the Supremacy Clause of the Constitution of the United States and violation of the Due Process Clause of the Fourteenth Amendment.

Respectfully submitted,

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## APPENDIX A.

### OUTLINE OF QUESTIONS PRESENTED AND LITIGATED IN OHIO COURTS DURING UPJOHN LITIGATION.

Contrary to the various statements made in Upjohn's Answer Brief, the history of this litigation in the Ohio courts confirms that (a) each and every issue was raised or assumed by the parties to be raised in the pleadings, (b) was presented by the evidence, (c) was considered by the parties and by the respective trial and appellate courts and thus preserved for the appeal thereafter taken to this Court.

In the Jurisdictional Statement submitted by Hudson herein, five (5) separate and distinct questions are posed with respect to the constitutionality of the Ohio Fair Trade Act (Jurisdictional Statement, pages 4 and 5):

Question 1 relates to the authority granted to a "proprietor" of a trademark or trade name to establish minimum resale prices for wholesalers with whom the proprietor is in competition (the "McKesson case" issue).

Question 2 relates to horizontal price fixing and boycotting agreements made permissible by the Act (the "horizontal agreement" issue).

Question 3 relates to the authority granted to proprietors to compel contracts to maintain minimum resale prices without consensual agreement (the "notice" issue).

Questions 4 and 5 relate, respectively, to violation of federal due process and the lack of severability of the illegal provisions from the balance of the Fair Trade Act (the "due process" and "severability" issues).

### A. The Court of Common Pleas.

All five (5) issues were raised in the litigation in the Court of Common Pleas; thereafter, the same issues were urged and considered by the respective Ohio courts and

ultimately determined by the decision of the Ohio Supreme Court rendered on May 8, 1963.

**1. In the Court of Common Pleas, Hudson's Petitions for Declaratory Judgment and the evidence thereunder clearly raised all Federal issues.**

The focus of each of Hudson's petitions for declaratory judgments was the direct challenge of the Ohio Fair Trade Act on both state and federal constitutional grounds. The initial petition for declaratory judgment was filed by Hudson on August 28, 1959 (R. 1-4). An amended petition for declaratory judgment was filed on October 28, 1959 (R. 5-7). Both petitions generally charged violation of federal due process and conflict under the Supremacy Clause of Article VI, Clause 2 of the United States Constitution between the Ohio Fair Trade Act and the Sherman Antitrust Act, the Miller-Tydings Act and the McGuire Act.

Hudson's second amended petition for declaratory judgment was filed in the Common Pleas Court on January 11, 1960 and is reproduced at pages 8 through 13 of the Transcript of Record. As in the case of the preceding petitions, such petition in Subparagraph B thereof alleges violation of the Supremacy Clause by reason of conflict between the Ohio Act and the Sherman Antitrust Act, the Miller-Tydings Act and the McGuire Act. The general specifications of illegality contained in Paragraph B are stated to apply to the enumerated Revised Code provisions thereafter appearing. Such code provisions are thereafter set forth in Subparagraphs B(1), B(2), B(3), and Paragraphs C and D, which sections contain additional specifications of incompatibility between the Ohio statute and federal law.

Subparagraph C alleges *the denial of federal due process;* the *horizontal agreement issue* is posed both in

Subparagraph B(1) and Paragraph C; the *notice issue* is specifically set forth in Subparagraph B(2); *severability* in Paragraph D.

The *McKesson issue* was recognized by the parties to be encompassed by the pleadings. The Stipulation re Evidence (R. 30) put in evidence the Smith Deposition disclosing Upjohn's wholesale marketing arrangements and McKesson and Upjohn's solicitation of the same retail accounts, the Smith Affidavit disclosing the *del credere* agency arrangement with McKesson (R. 101-109), the Block Affidavit challenging on grounds of estoppel McKesson's status as a *del credere* agent and describing the competition between Upjohn and McKesson for the business of the retail druggist (R. 70-83), and the Affidavit of Hudson's Counsel (R. 56-60).

Paragraph D of the second amended petition raised the general allegation of illegality, declaring that the entire Fair Trade Act, Sections 1333.27 through 1333.32, are in conflict with both state and federal constitutions and hence null and void. Thus, both generally and specifically, Hudson's second amended petition raises the five (5) issues presented on the instant appeal.

**2. Hudson's briefs in support of the allegations contained in the petition contain extended discussions and issues of each of the five (5) questions now presented.**

As the Docket Entries show (R. 367-370), Hudson filed three Briefs and a "Memorandum re antitrust effects of *del credere* agency contract." The thrust of these briefs was principally an attack of the Ohio Fair Trade Act on Federal grounds.

The Table of Contents for the Brief in Support of Petition was as follows:

The *McKesson issue* was specifically discussed in Hudson's initial Brief in Support of Petition at pages 5, 6, 9 and 10. Both the Common Pleas Court and Upjohn were thus apprised that the *McKesson issue* was directly tendered.

The *McKesson issue* was tendered, moreover, in virtually the identical posture presented to this Court, pages 9 and 10 of such brief, reading in part as follows:

"D. *The Ohio Fair Trade Law Authorizes the Making of Contracts at Competitive Levels of Distribution Despite the Express Prohibitions of the McGuire Act.*

As has already been pointed out, Section 1333.29 (A) provides:

> "A proprietor may so establish such minimum resale prices for his wholesale distributors, notwithstanding section 1333.34 of the Revised Code, even though he sells such commodity to retailers in competition with such wholesale distributors, if such sales to retailers are made at prices not less than those he establishes for such wholesale distributors for comparable sales."

It is impossible to square this provision of the new Ohio Fair Trade Act with Section 5 of the McGuire Act and *United States v. McKesson & Robbins, Inc.*, 351 U. S. 305 (1956).

It is immaterial that, as Mr. Smith pointed out in his deposition, there is a price differential between Upjohn's direct sales to retailers and the McKesson & Robbins offering to the same retailers (Deposition, page 45). As the Supreme Court said in *McKesson Robbins*, since appellee competes 'at the same functional level' with each of the 94 wholesalers with whom it has price fixing agreements, 'the proviso prevents these agreements from falling within the statutory exemption.' The court further states, in rejecting economic arguments of the parties to the appeal:

> "Congress has marked the limitations beyond which price fixing cannot go. We are not only bound by those limitations but we are bound to construe them strictly, since resale price maintenance is a privilege restrictive of a free economy."

> It follows from the foregoing that the provisions of the new Ohio Fair Trade Act which permit the doing of what Congress has expressly interdicted, namely, the making of fair trade contracts with wholesalers, is in flat contradiction and violation of federal law."

Yet another reference to the *McKesson issue* was made by Hudson in its "Supplemental Memorandum re Antitrust Effects of Del Credere Agency Contract" filed with the Common Pleas Court on March 26, 1960, which quoted at length from the brief of the United States in *United States vs. McKesson and Robbins, Inc.*, 351 U. S. 305 (1956) dealing with the illegality under Section 5(a)(5) of the McGuire Act of *del credere* agency arrangements between competing wholesalers.

Upjohn's contention (Upjohn Brief at 14) that the *McKesson issue* derives *solely* from the allegations made in Hudson's "Second Amended Reply to Answer and Answer to Cross Petition" filed on June 16, 1960 (Transcript of Record, pages 27 through 30), is wholly without foundation. It is true, of course, that the *McKesson issue* was also therein raised since it was directly related to Upjohn's standing to sue and to the allegations asserted by Upjohn in its cross-petition relative to its distribution system. This in no way alters the further fact, however, that the *McKesson issue* was present in this litigation since its inception, which is clearly demonstrable from the foregoing.

**3. Upjohn joined issue on the Federal questions.**

In the face of plaintiff's direct attack on the Ohio Fair Trade Law on Federal grounds, Upjohn of necessity was forced to join issue on these questions. In Upjohn's "Memorandum in Support of Defendant's Motion for Summary Judgment on Plaintiff's Petition for Declaratory Judg-

ment," Upjohn at pages 43 and 44 specifically answered the federal constitution issues, contending, first, that there was no interstate commerce, and, second, that the McGuire Act "clearly and explicitly" exempts the legislation here in question.

Again, in defendant's Supplemental Brief and the index to such Brief, Hudson stated:

> "The Miller-Tydings Act has no bearing upon the constitutionality of the Fair Trade Act."

This issue was discussed at pages 26 through 29 in such Brief. Certified copies of the Briefs of the parties have been deposited with the Clerk of this Court.

**4. The decision in the Court of Common Pleas plainly indicates that the parties had joined issue on the Federal questions.**

The Trial Judge's opinion clearly showed his consideration of the relationship between the federal and state enactments. The court considered such conflict and, as urged by Hudson, found an incongruity between the rights sought to be conferred upon the holder of a trade mark and that possessed by the holder of a patent. Said the Court:

> "The argument is made that since the power to fix prices was available at common law, the Fair Trade Act only [fol. 428] restores this right; and therefore, cannot be a delegation of legislative power. With this argument, the court cannot agree. The act is not to nullify the Valentine Act, but to be an exception to it. *The Fair Trade Act only has existence because Congress made such acts an exception to the Sherman Act. Its existence does not stem from a common law right, but it stems as a specific exemption to the Sherman Act,* and only has life as it fits the exemption. The Fair Trade Act itself rebuts this argument. The legislature specifically granted a propri-

etary interest in a trade-mark or name, and gave this right to anyone holding this interest to set minimum prices. This right did not exist at common law to the holder or assignee or designee of a trade-mark or name. He may have the right to set prices generally at common law, but not because of his proprietary interest in his trade-mark. For common law rights of trade-marks generally, see: *U. S. v. Timken,* 83 F. Supp. 284 (at p. 315). *This right granted to a holder of a trade-mark is greater than that possessed by the holder of a patent. U. S. v. Masonite,* 62 S. Ct. R. 1070; 316 U. S. 265. This is a specific legislative enactment that gives a holder of a trade-mark or name a right he did not possess previously. This was clearly denoted in the *Union Carbide* case, *supra.*" (Record, page 375)

Judge McNeill's decision also specifically noted that the issues raised in the briefs were considered by the court although not discussed in the Opinion in view of the court's finding of lack of constitutionality on state grounds, the court stating:

"The court deciding this issue as it has, other questions concerning the act raised in the briefs are not discussed."

**5. The Court of Common Pleas also decided the Severability Issue Adversely to Upjohn.**

The Journal Entry recorded in the Court of Common Pleas not only recited the finding of unconstitutionality but also stated that the provisions of the Ohio Fair Trade Act were "integral and inseparable," necessitating the vitiation of the entire legislative enactment.

Upjohn itself subsequently conceded the scope of the issues which were before the trial court. At page 24 of its brief to the Court of Appeals for Cuyahoga County, it stated:

"Inasmuch as the court below rested its decision upon the delegation of authority argument, an extended analysis of the other constitutional objections raised by plaintiff in the court below is perhaps unnecessary."

Of the five (5) issues presently posed to this Court, then, each was posed to the Court of Common Pleas prior to its judgment on July 28, 1960. As will be hereafter observed, each of such issues was also presented and considered by the Ohio Appellate and Supreme Courts and decided adversely to Hudson.

### B. Proceedings in Court of Appeals.

**1. Hudson's Brief, as appellee in the Court of Appeals for Cuyahoga County, was a reiteration of the Federal argument that had been presented to the trial court.**

The table of contents of Hudson's Brief in the Court of Appeals reflects four (4) of the five (5) issues raised in the instant appeal were presented to the Appellate Court, (the *McKesson*, the *horizontal agreement*, the *notice* and the *severability* issue):

"I. The New Ohio Fair Trade Law Is in Violation of Section 5 of the McGuire Act.

A. The Ohio Fair Trade Law Violates the McGuire Act which Specifically Prohibits Horizontal Price Fixing.

B. The Upjohn Company Has Given Notice to Distributors and to Retailers of Both Wholesale and Retail Fair Trade Prices, with Upjohn Directly Competing with Its Wholesalers for the Business of Retailers.

C. The Attempted Defense of The Upjohn Company, Based on "Del Credere" Agency Agreements, was Specifically Disapproved by the Supreme Court of the United States in the Masonite Case.

D. The Ohio Fair Trade Law Authorizes the Making of Contracts at Competitive Levels of Distribution Despite the Express Prohibitions of the McGuire Act.

E. The Illegal Provisions of the Ohio Fair Trade Law Are Not Severable.

* * * * *

III. The New Ohio Fair Trade Law Could Be Validly Enacted Only by the Congress of the United States."

The fifth issue, *federal due process*, was also raised in the text of the brief. At Page 23 of Hudson's brief, it was noted:

> "Such protection may not be achieved at the expense of constitutional guarantees and freedoms. Hudson has discussed in its Brief in the companion *Lilly* Appeal to this Court why the Fair Trade Law constitutes an unlawful delegation of legislative power and a deprivation of due process, in addition to a gross abuse of the police power."

The discussion to which reference is made in the Lilly brief appears therein under the title "The Notice Provisions and Nonsigner Provisions of the Ohio Fair Trade Act Deprive the Plaintiff of Its Property Without Due Process of Law." Hudson therein equated the due process requirements of Article I, Sections 1 and 19 of the Ohio Constitution with the due process guarantees of the Fourteenth Amendment to the United States Constitution. Said Hudson:

> "These provisions of the Ohio Constitution give to every person the assurance that his rights in and to property shall not be disturbed by governmental action. Similar protection is afforded by the Fourteenth Amendment to the United States Constiution."

**2. Upjohn joined issue on the Federal questions in the Court of Appeals.**

Once again Upjohn necessarily joined issue with Hudson on the federal issues posed. Upjohn specifically argued at page 17 of its Reply Brief that intrastate transactions were not reached by the McGuire Act and that there was no collision between the provisions of the Ohio Fair Trade Act and the *McKesson and Robbins* decision. (Brief, pp. 16-17.)

**3. In opposing Hudson's Petition for Rehearing, Upjohn insisted that the Court of Appeals had considered and overruled all Federal questions.**

Following the submission of briefs, oral argument and the decision of the Court of Appeals, Hudson petitioned the court for a rehearing on the grounds that the court did not appear to have sufficiently considered the impact of the Supremacy Clause of the Federal Constitution on the validity of the Ohio statute, the creation of an implied contract under the facts of this case (that is, that all plaintiff's goods were purchased outside Ohio), and the effect of Section 5(a)(5) of the McGuire Act. (R. 409-410.) Four (4) out of the five (5) issues are reflected in the Petition for Rehearing.

Upjohn's Brief in Opposition to Petition for Rehearing emphasized the "ludicrousness" of the contention being made to the Court of Appeals by Hudson:

> "None of the points raised by the applicant for reconsideration in the instant case are new. All were treated far more extensively in the original briefs submitted to the court. All were argued orally by counsel for the applicant at the hearing before this Court.
>
> * * * * *

Starting on page 1 and continuing on page 22 of applicant's initial answer brief in *The Upjohn Company* case, counsel for the applicant opened up the very same attack he is not asserting. In applicant's initial answer brief in the *Eli Lilly* case fully 12 pages (16-27) are devoted to development of the same point.

More importantly, the majority in its opinion clearly considered the questions raised by Federal statutes so that applicant's assertion that this Court missed the 'impact of the Supremacy Clause of the Federal Constitution' *borders on the ludicrous*. This Court in its majority opinion discussed the evolution of Federal Statutory Law and the significant Federal decisions regarding fair trade in painstaking detail on pages 8 to 25. The Court properly concluded that the implied contract provision of the new act did not offend constitutional provisions (p. 38, opinion).

* * *

In short, the present application raises points that are not new, were more extensively briefed before, and were given consideration and rejected by the Court." (Emphasis added.)

Certified copies of all Briefs of the parties in the Court of Appeals have been deposited with this Court.

**4. The Judgment of the Court of Appeals encompassed the Federal questions.**

Thirteen (13) days after the filing of Upjohn's Brief in Opposition to the Petition for Rehearing, the Court of Appeals denied Hudson's request and entered its Journal Entry, which pointedly showed its consideration of the federal as well as the state issues. The Judgment of the Court stated in part:

"1. Sections 1333.27 through 1333.34 of the Ohio Revised Code are valid, lawful, and enforceable enactments of the Ohio General Assembly and are neither

in violation of the Constitution of the State of Ohio, nor in violation of the Constitution of the United States." (R. 411-412.)

Upjohn's present argument that the federal issues were not considered by the Appellate Court in Ohio flatly contradicts the unambiguous language used by the court and its own contentions. It also overlooks the fact that the finding of state constitutionality could not have been reached without the corollary finding of federal constitutionality.

### C. Appeal to Ohio Supreme Court.

Within the period prescribed by Ohio law, Hudson filed with the Supreme Court of Ohio its Notice of Appeal from the decision rendered by the Cuyahoga County Court of Appeals. Two (2) grounds were specified in this Notice of Appeal: (a) a case involving a constitutional question; (b) on condition that a motion to certify be allowed by the court.

Pursuant to the second ground urged in the Notice of Appeal, Hudson filed with the Ohio Supreme Court a motion for an order requiring the Court of Appeals to certify its record to that court for consideration and decision. Following the liberal appeal procedures in effect in Ohio, the motion merely recited that:

> "The cause and questions involved herein are of public and great general interest, as will be more fully disclosed by the briefs to be filed."

#### 1. The Brief in Support of Motion to Certify Record clearly raised the Federal questions.

Rule 8, Section 3 of the Rules of the Supreme Court of Ohio requires that the specific assignment of error be contained in the brief in support of such motion, together with

"a statement of the questions of law presented." By Rule 8, Section 4, a like requirement is imposed upon appellee's brief.

In response to such rules, in its Brief in Support of Motion to Certify Record, p. 1, Hudson stated for its second Assignment of Error:

> "For its second assignment of error, plaintiff-appellant states that the Court of Appeals for Cuyahoga County erred in finding that Sections 1333.27 through 1333.34, inclusive, of the Ohio Revised Code are valid, lawful and enforceable enactments of the Ohio General Assembly and do not violate either the Constitution of the United States or any law of the United States.
>
> II. Is the Ohio Fair Trade Law, Ohio Revised Code, Sections 1333.27 through 1333.34, inclusive, violative of the Constitution of the United States or of any law of the United States?
>
> The Court of Appeals for Cuyahoga County answered: 'No.'
>
> Plaintiff-appellant contends the answer should be 'Yes.'"

Hudson's statement (p. 2) of the second Question of Law involved on the appeal similarly stated:

> "II. Is the Ohio Fair Trade Law, Ohio Revised Code, Sections 1333.27 through 1333.34, inclusive, violative of the Constitution of the United States or of any law of the United States?
>
> The Court of Appeals for Cuyahoga County answered: 'No.'
>
> Plaintiff-appellant contends the answer should be 'Yes.'"

The argument in the Brief in Support of Motion to Certify Record (p. 18) stated in part:

> "Grave questions also exist as to whether the new Ohio Fair Trade Act violates the Supremacy Clause of

the United States Constitution by exceeding the bounds set for fair trade legislation by the McGuire Act, 15 U. S. C., Section 45 and the Miller-Tydings Act, 15 U. S. C., Section 1. The federal enabling legislation requires the entry into *actual contracts* under State Fair Trade Laws, not mere 'contracts by notice.' Moreover, the McGuire Act specifically prohibits a manufacturer from fair trading at the wholesale level when he is in competition with his wholesalers for the custom of a retailer. The new Ohio Fair Trade Law specifically permits such unlawful horizontal price fixing."

**2. Upjohn joined in Hudson's Motion to Certify on Federal grounds.**

In its Answer of The Upjohn Company to Brief in Support of Motion to Certify Record, filed by Upjohn with the Supreme Court of Ohio, Upjohn, while reserving its rights to oppose *on the merits* the assignments of error urged by Hudson, nonetheless joined in submitting the issues posed by Hudson to the court for its consideration and judgment. Upjohn's Brief first specifically noted that the assignments of error included federal issues:

"An appeal was taken to the United States Supreme Court (Standard Drug v. General Electric, Case No. 127 of the 1961 Term) and on October 9, 1961 the Supreme Court sustained a motion to dismiss the appeal for want of a substantial federal question, thus laying to rest the second assignment of errors advanced by appellant herein that the Ohio Fair Trade Act violates a Federal law or the United States Constitution." (p. 3.)

The Upjohn Brief then concluded by joining in the Motion:

"Thus appellee, while in no way admitting or conceding any merit to the assignments of error or argu-

ment presented by appellant in support of those assignments of error, *joins with appellant in requesting that the motion to certify of appellant be granted.*" (p. 4).

**3. Hudson's Briefs in the Supreme Court of Ohio clearly raised the Federal questions.**

On Jan. 10, 1962, the Supreme Court allowed the Hudson appeal on both grounds specified in its notice of appeal, that is, as a case involving constitutional questions and on the court's allowance of Hudson's motion to certify. Hudson thereupon filed its Brief on the Merits with the court.

As the partial excerpt from the table of contents of Hudson's Brief hereafter demonstrates, the full range of federal questions now presented to this court were likewise presented to the Supreme Court of Ohio:

The table of contents of Hudson's Reply Brief likewise states in part:

The scope of Hudson's briefs, both in the Court of Appeals and in the Supreme Court of Ohio, are of particular import by virtue of the requirements of Ohio appellate practice that issues urged by brief on appeal be heard and decided by the Appellate Court. This requirement is contained in Ohio Revised Code, Section 2505.21, reference to which has been made by Hudson at pages 6-7, *supra*.

**4. Upjohn joined issue on the Federal questions.**

As in the Court of Common Pleas, as in the Court of Appeals, and pursuant to Upjohn's joinder in Hudson's motion to certify, Upjohn again joined issue on the Federal questions raised. Its Answer Brief filed therein:

> "All doubt concerning any federal question or infirmity under the federal laws in the new Ohio type Fair Trade Act has now expressly been laid to rest by the Supreme Court itself. Subsequent to the ruling on these questions by the Supreme Court of Virginia, an appeal raising these federal questions was taken to the United States Supreme Court in Case No. 127 and that Court dismissed the appeal on the ground that 'no substantial federal question' was presented. In order that this Court may satisfy itself that all conceivable federal questions were thoroughly raised in that case, a copy of the jurisdictional statement in that case is attached hereto as Appendix C.
>
> The Supreme Court of the United States is, of course, the ultimate arbiter of the existence or nonexistence of a 'federal question' and whether or not a state statute in a given situation violates either federal law or the Constitution of the United States. In acting upon the Virginia statute, after which the Ohio Act was patterned, the Supreme Court found that the Standard Drug case, arising upon that statute, did not present a 'substantial federal question'." (page 69.)

**D. All Federal Issues were properly raised and resolved in the Courts below.**

It is clear that the Federal issues raised in the instant appeal were not only considered but decided by the Supreme Court. The obligation to consider the questions raised by Hudson was imposed upon the Ohio Supreme Court by statute. Moreover, the opinion specifically recites that "none of the constitutional attacks on this new Act have merit." (R. 424.)

Nowhere does the Ohio Supreme Court decision state or imply that the federal issues posed by Hudson were not preserved below or ripe for determination. Likewise, no such statement or inference is contained in the decision of the Court of Appeals, where the same issues were urged.

In short, Upjohn's present contentions are at odds with Upjohn's position in the courts below, with the pleadings, with the briefs filed in the Ohio courts by both Hudson and Upjohn, with Ohio appellate procedure, and with the express statements by the Ohio appellate Courts that they had considered and rejected the federal issues posed by Hudson.

## APPENDIX B.

No. 730,118.

IN THE COURT OF COMMON PLEAS.

STATE OF OHIO, COUNTY OF CUYAHOGA, SS.

---

HUDSON DISTRIBUTORS, INC.,

*Plaintiff,*

vs.

ELI LILLY AND COMPANY,

*Defendant.*

---

**MOTION TO STRIKE SECOND DEFENSE OF SECOND AMENDED ANSWER TO CROSS-PETITION; DEMURRER TO THIRD DEFENSE OF SECOND AMENDED ANSWER TO CROSS-PETITION; AND DEMURRER TO INTERROGATORIES ATTACHED TO SECOND AMENDED ANSWER TO CROSS-PETITION.**

MOTION TO STRIKE SECOND DEFENSE OF SECOND AMENDED ANSWER TO CROSS-PETITION.

Now comes the defendant, Eli Lilly and Company, and respectfully moves the Court for an order striking the Second Defense of the plaintiff's Second Amended Answer to Cross-Petition for the reason that the plaintiff is barred from now asserting this defense.

DEMURRER TO THIRD DEFENSE OF SECOND AMENDED ANSWER TO CROSS-PETITION.

Now comes the defendant and demurs to the third defense of the Second Amended Answer herein on the grounds that it appears on the face of the Second Amended

Answer that it does not contain sufficient facts to constitute a defense to the cause of action contained in the Cross-Petition.

DEMURRER TO INTERROGATORIES ATTACHED TO SECOND AMENDED ANSWER TO CROSS-PETITION.

The defendant demurs to the Interrogatories attached to the Second Amended Answer to the Cross-Petition, Nos. 1, 2, 3, 4, 5, 6A, 6B, 8, 9, 10, 11, 12, 13, 14 and 15, on the ground that none of such Interrogatories is material or pertinent to the cause of action contained in the Cross-Petition.

HENDERSON, QUAIL, SCHNEIDER & PEIRCE,
*Attorneys for Defendant.*

BRIEF IN SUPPORT OF MOTION TO STRIKE SECOND DEFENSE OF SECOND AMENDED ANSWER TO CROSS-PETITION.

* * * * *

BRIEF IN SUPPORT OF DEMURRER TO THIRD DEFENSE OF SECOND AMENDED ANSWER TO CROSS-PETITION.

Plaintiff states as a Third Defense that defendant's form of fair trade contract illegally compels retailers to enter into unlawful horizontal price fixing agreements with competing retailers.

Defendant's fair trade contract was attached to the Cross-Petition as Exhibit B, and is a part of the record in this case. The validity of defendant's contract was an issue in the earlier proceedings before this Court and before the Court of Appeals for Cuyahoga County. This Court, although finding the Ohio Fair Trade Act unconstitutional, did not suggest any infirmity in the form of defendant's contract. The Court of Appeals held the Act constitutional and upheld the validity of the defendant's contract under

the Act; that holding was affirmed by the Supreme Court of Ohio.

This Third Defense has already been adjudicated in this proceeding. The defendant's Demurrer should be granted.

BRIEF IN SUPPORT OF DEMURRER TO INTERROGATORIES ATTACHED TO SECOND AMENDED ANSWER TO CROSS PETITION.

* * * * * *

5. Interrogatory No. 15 relates to the plaintiff's charge, contained as the Third Defense of its Second Amended Answer to the Cross-Petition, that defendant's form of fair trade contract with retailers compels retailers to enter into illegal horizontal price fixing agreements. As stated in the foregoing Brief in support of the Demurrer to this Third Defense, the defendant's fair trade contract was upheld by the Court of Appeals of Cuyahoga County, and this determination was affirmed by the Ohio Supreme Court. Accordingly, Interrogatory No. 15 is not pertinent.

Respectfully submitted,

HENDERSON, QUAIL, SCHNEIDER & PEIRCE,
*Attorneys for Defendant.*

SERVICE.

A copy of the foregoing Motion to Strike Second Defense of Second Amended Answer to Cross-Petition; Demurrer to Third Defense of Second Amended Answer to Cross-Petition; and Demurrer to Interrogatories Attached to Second Amended Answer to Cross-Petition, together with the Briefs in support of same, was delivered this 9th day of July, 1963, to Lane, Krotinger and Santora, attorneys for plaintiff.

HENDERSON, QUAIL, SCHNEIDER & PEIRCE,
*Attorneys for Defendant.*

## APPENDIX C.

### OUTLINE OF QUESTIONS PRESENTED AND LITIGATED IN OHIO COURTS DURING LILLY LITIGATION.

Contrary to the various statements contained in Lilly's Answer Brief, each and every issue raised by Hudson's Jurisdictional Statement was raised in the pleadings, presented and considered by the respective trial and appellate courts of the State of Ohio, and thus preserved for the appeal taken to this Court. The issues were raised at the beginning of litigation in the Court of Common Pleas in January of 1960 with the filing of Hudson's Amended Petition for Declaratory Judgment, they remained in the case and were considered and decided by the Ohio Supreme Court in its decision on constitutionality rendered May 8, 1963. It is hardly surprising that this should be so, inasmuch as the focus of the Declaratory Judgment Petition was the direct challenge to the Ohio Fair Trade Act on State and Federal Constitutional grounds.

Five basic questions are presented by Hudson in the Jurisdictional Statement filed with this Court. (Pages 4 and 5 of Hudson Jurisdictional Statement.) As characterized by Appellee, Lilly, on pages 2 and 3 of the Answer Brief filed herein, these questions are:

(a) The "McKesson Case" issue;

(b) The "Horizontal Agreement" issue;

(c) The "Notice" issue;

(d) The "Due Process" issue; and

(e) The "Severability" issue.

## A. The Court of Common Pleas.

### 1. In the Court of Common Pleas, Hudson's Amended Petition for Declaratory Judgment and the evidence thereunder clearly raised all Federal issues.

Subparagraphs (b), (c) and (d) of Hudson's Amended Petition for Declaratory Judgment reproduced at pages 5 through 7 of the Record, both generally and specifically, alleged conflict with the Sherman Antitrust Act, conflict with the Miller-Tydings and McGuire Acts and violation of the Supremacy Clause of Article VI, Clause 2 of the United States Constitution.

In subparagraph (c) of the Amended Petition specific reference was made to the Ohio Code provisions raising the McKesson and horizontal pricing issues. In addition to the foregoing general grounds, such subparagraph also pleaded violation of Federal due process under the Fourteenth Amendment to the Constitution.

The notice question is found in subparagraph (b)(2) of the Amended Petition, likewise containing both general and specific charges of conflict with applicable Federal law.

In addition to the specific Revised Code provisions set forth in subparagraphs (b) and (c), stated by the opening paragraph of paragraph (b) to be in conflict with the Miller-Tydings Act, the McGuire Act and in violation of the Supremacy Clause, paragraph (d) contained the further allegation that the entire Ohio Fair Trade Act was incapable of separation and likewise unconstitutional.

### 2. Hudson's Brief in support of the allegations contained in its Amended Petition and its Reply Brief contained extended discussion of each of the five questions pressed on the instant appeal.

The Table of Contents of such Briefs reads in part as follows:

"BRIEF IN SUPPORT OF PETITION

* * * * *



* * * * *

The McKesson issue was specifically raised at page 7 of Brief in Support of Petition, Hudson noting:

> "It is impossible to square this provision of the new Ohio Fair Trade Act with Section 5 of the McGuire Act and *United States v. McKesson & Robbins, Inc.*, 351 U. S. 305 (1956).
>
> It follows from the foregoing that the provisions of the new Ohio Fair Trade Act which permit the doing of what Congress has expressly interdicted, namely, the making of fair trade contracts with wholesalers, is in flat contradiction and violation of federal law."

**3. The decision in the Court of Common Pleas plainly indicates that the parties had joined issue on the Federal questions.**

The Trial Judge's opinion clearly showed his consideration of the relationship between the federal and state enactments. The court considered such conflict and, as urged by Hudson, found an incongruity between the rights sought to be conferred upon the holder of a trade mark and that possessed by the holder of a patent. Said the Court:

> "The argument is made that since the power to fix prices was available at common law, the Fair Trade Act only (fol. 428) restores this right; and therefore, cannot be a delegation of legislative power. With this argument, the court cannot agree. The act is not to nullify the Valentine Act, but to be an exception to it. *The Fair Trade Act only has existence because Congress made such acts an exception to the Sherman Act. Its existence does not stem from a common law right, but it stems as a specific exemption to the Sherman Act*, and only has life as it fits the exemption. The Fair Trade Act itself rebuts this argument. The legislature specifically granted a proprietary interest in a trade-mark or name, and gave this right to anyone holding this interest to set minimum prices. This right did not exist at common law to the holder or assignee or designee of a trade-mark or name. He may have the right to set prices generally at common law, but not because of his proprietary interest in his trade-mark. For common law rights of trade-marks generally, see: *U. S. v. Timken*, 83 F. Supp. 284 (at p. 315). *This right granted to a holder of a trade-mark is greater than that possessed by the holder of a patent. U. S. v. Masonite*, 62 S. Ct. R. 1070; 316 U. S. 265. This is a specific legislative enactment that gives a holder of a trade-mark or name a right he did not possess previously. This was clearly denoted in the *Union Carbide* case, *supra*." (Record, page 375) (Emphasis supplied.)

Judge McNeill's decision also specifically noted that the issues raised in the briefs were considered by the court although not discussed in the Opinion in view of the court's finding of lack of constitutionality on state grounds, the court stating:

> "The court deciding this issue as it has, other questions concerning the act raised in the briefs are not discussed."

**4. The Court of Common Pleas also decided the Severability Issue Adversely to Lilly.**

The Journal Entry recorded in the Court of Common Pleas not only recited the finding of unconstitutionality but also stated that the provisions of the Ohio Fair Trade Act were "integral and inseparable," necessitating the vitiation of the entire legislative enactment.

Of the five (5) issues presently posed to this Court, then, each was posed to the Court of Common Pleas prior to its judgment on July 28, 1960. As will be hereafter observed, each of such issues was also presented and considered by the Ohio Appellate and Supreme Courts and decided adversely to Hudson.

## B. Proceedings in Court of Appeals.

**1. Hudson's Brief, as appellee in the Court of Appeals for Cuyahoga County, was a reiteration of the Federal argument that had been presented to the trial court.**

The record in the Court of Appeals for Cuyahoga County was that the Federal questions urged before the Court of Common Pleas by Hudson were also urged and considered by that court.

The table of contents of Hudson's Brief in the Court of Appeals reads in part as follows:

**2. In opposing Hudson's Petition for Rehearing, Lilly insisted that the Court of Appeals had considered and overruled all Federal Questions.**

Following the submission of briefs, oral argument and the decision of the Court of Appeals, Hudson petitioned the court for a rehearing on the grounds that the court did not appear to have sufficiently considered the impact of the Supremacy Clause of the Federal Constitution on

the validity of the Ohio statute, the creation of an implied contract under the facts of this case (that is, that all plaintiff's goods were purchased outside Ohio), and the effect of Section 5(a)(5) of the McGuire Act. (R. 409-410.) Four (4) out of the five (5) issues are reflected in the Petition for Rehearing.

Certified copies of all briefs in the Court of Appeals have been deposited with this Court.

That the court had not considered the federal questions, was flatly contradicted by Lilly, which stated in its "Brief of Defendant-Appellant in Opposition to Petition for Rehearing," filed September 8, 1961:

> "Hudson's Petition for Rehearing, and its Brief in Support, merely reiterate arguments which were made by Hudson in its brief and its oral argument to this Court; the asserted grounds for the Petition for Rehearing were all discussed in the briefs of the parties and were orally argued."

On September 21, 1961, the Court of Appeals for Cuyahoga County denied Hudson's Petition for Rehearing and the Journal Entry subsequently entered by the court on September 27, 1961 (reproduced at pages 38 and 39 of the Record) is cited:

> "It is therefore * * * considered, ordered and adjudged that Sections 1333.27 through 1333.34 of the Ohio Revised Code be and the same hereby are declared to be valid, lawful and enforceable enactments of the Ohio General Assembly and not to be in violation of the Constitution of the State of Ohio or of the Constitution of the United States or of any law of the United States; that final judgment be and the same hereby is now entered in this Court for the Defendant-Appellant on the petition filed in this cause in the Court of Common Pleas of Cuyahoga County by the Plaintiff-Appellee * * *."

### C. Appeal to Ohio Supreme Court.

Within the period prescribed by Ohio law, Hudson filed with the Supreme Court of Ohio its Notice of Appeal from the decision rendered by the Cuyahoga County Court of Appeals. Two (2) grounds were specified in this Notice of Appeal: (a) a case involving a constitutional question; (b) on condition that a motion to certify be allowed by the court.

Pursuant to the second ground urged in the Notice of Appeal, Hudson filed with the Ohio Supreme Court a motion for an order requiring the Court of Appeals to certify its record to that court for consideration and decision. Following the liberal appeal procedures in effect in Ohio, the motion merely recited that:

> "The cause and questions involved herein are of public and great general interest, as will be more fully disclosed by the briefs to be filed."

#### 1. The Brief in Support of Motion to Certify Record clearly raised the Federal questions.

Rule 8, Section 3 of the Rules of the Supreme Court of Ohio requires that the assignment of error be contained in the brief in support of such motion, together with "a statement of the questions of law presented." By Rule 8, Section 4, a like requirement is imposed upon appellee's brief.

In response to such rules, in its Brief in Support of Motion to Certify Record, pp. 1-2, Hudson stated for its second Assignment of Error:

> "For its second assignment of error, plaintiff-appellant states that the Court of Appeals for Cuyahoga County erred in finding that Sections 1333.27 through 1333.34, inclusive, of the Ohio Revised Code are valid, lawful and enforceable enactments of the Ohio Gen-

eral Assembly and do not violate either the Constitution of the United States or any law of the United States.

II. Is the Ohio Fair Trade Law, Ohio Revised Code, Sections 1333.27 through 1333.34, inclusive, violative of the Constitution of the United States or of any law of the United States?

The Court of Appeals for Cuyahoga County answered: 'No.'

Plaintiff-appellant contends the answer should be 'Yes.' "

Hudson's statement (p. 2) of the second Question of Law involved on the appeal similarly stated:

"II. Is the Ohio Fair Trade Law, Ohio Revised Code, Sections 1333.27 through 1333.34, inclusive, violative of the Constitution of the United States or of any law of the United States?

The Court of Appeals for Cuyahoga County answered: 'No.'

Plaintiff-appellant contends the answer should be 'Yes.' "

The argument in the Brief in Support of Motion to Certify Record (p. 18) stated in part:

"Grave questions also exist as to whether the new Ohio Fair Trade Act violates the Supremacy Clause of the United States Constitution by exceeding the bounds set for fair trade legislation by the McGuire Act, 15 U. S. C., Section 45 and the Miller-Tydings Act, 15 U. S. C., Section 1. The federal enabling legislation requires the entry into *actual contracts* under State Fair Trade Laws, not mere 'contracts by notice.' Moreover, the McGuire Act specifically prohibits a manufacturer from fair trading at the wholesale level when he is in competition with his wholesalers for the custom of a retailer. The new Ohio Fair Trade Law specifically permits such unlawful horizontal price fixing."

**2. Lilly joined in Hudson's Motion to Certify on Federal grounds.**

In its "Brief of Defendant-Appellee on Motion to Certify Record," filed by Lilly in the Supreme Court of Ohio, Lilly, while opposing the assignments of error urged by Hudson on the merits, nonetheless joined in submitting the issues posed by Hudson to the court for its consideration and judgment.

The Federal issues raised by Hudson's appeal on constitutional grounds and in its Motion to Certify the Record joined in by Lilly thus brought the Federal questions squarely before the Ohio Supreme Court.

**3. Hudson's Briefs in the Supreme Court of Ohio clearly raised the Federal questions.**

In January of 1962, the Supreme Court allowed the Hudson appeal on both grounds specified in its notice of appeal, that is, as a case involving constitutional questions and on the court's allowance of Hudson's motion to certify. Hudson thereupon filed its Brief on the Merits with the court.

As the partial excerpt from the table of contents of Hudson's Brief hereafter demonstrates, the full range of federal questions now presented to this Court were likewise presented to the Supreme Court of Ohio:

"III. The New Fair Trade Law Deprives Appellant of its Property Without Due Process of Law ____ 30

A. The Trademark Is Merely a Mark of Identification or Origin _____ 33

B. The Manufacturer of the Trademarked Article Has Been Fully Compensated in His Asking Price for His Efforts in Securing Public Identification of the Product with the Manufacturer's Trademark or Trade Name _____ 35

The table of contents of Hudson's Reply Brief likewise states in part:

The scope of Hudson's briefs, both in the Court of Appeals and in the Supreme Court of Ohio, are of particular import by virtue of the requirements of Ohio appellate practice that issues urged by brief on appeal be heard and decided by the Appellate Court. This requirement is contained in Ohio Revised Code, Section 2505.21, reference to which has been made by Hudson at pages 6-7, *supra*.

**D. All Federal Issues were properly raised and resolved in the Courts below.**

It is clear that the Federal issues raised in the instant appeal were not only considered but decided by the Supreme Court. The obligation to consider the questions raised by Hudson was imposed upon the Ohio Supreme Court by statute. Moreover, the opinion specifically recites that "none of the constitutional attacks on this new Act have merit." (R. 424.)

Nowhere does the Ohio Supreme Court decision state or imply that the federal issues posed by Hudson were not preserved below or ripe for determination. Likewise, no such statement or inference is contained in the decision of the Court of Appeals, where the same issues were urged.

In the decision of the Ohio Supreme Court rendered on May 8, 1963 there is not one word or one line of the

opinion which could be construed as furnishing support to the position now urged by Lilly. It is clear that the Federal issues raised in the instant appeal were not only considered, but decided by the Supreme Court of Ohio. Indeed, the Federal issues necessarily required decision before consideration could be given to the state constitutional issues posed. Moreover, the opinion specifically recites that "none of the constitutional attacks on this new act have merit."

**E. Motion to Dismiss in the Supreme Court of the United States.**

The contention of Lilly now urged upon this Court, is further discredited by the Motion to Dismiss Hudson's Appeal filed herein by Lilly. Point 3 of Lilly's reasons in support of this motion reads as follows:

> "The history of fair trade in the United States Congress and in the federal courts shows that the Ohio Fair Trade Act is valid under federal law."

Lilly's argument in this motion is on the merits. No mention whatever is made of any alleged failure of Ohio courts to consider and decide the federal issues presented. Counsel for Lilly preparing such motion was also counsel for Lilly throughout the courts of Ohio.

Ohio counsel's joinder on the merits and the total absence in the motion to dismiss of any procedural considerations now sought to be interjected underscores the course of the litigation throughout the Ohio courts and the formulation and maturing of the issues now presented to this Court.

**F. The courts and parties construed both litigations as raising the same constitutional issues.**

The *Lilly* case and the companion *Upjohn* case, were construed both by the parties and the Ohio courts as raising the same constitutional considerations.

The introduction of the decisions rendered in the Court of Common Pleas, the Court of Appeals and the Supreme Court of Ohio demonstrate the identity of the issues raised in each case.

The Common Pleas decision begins:

"These cases, although heard separately by the court, involve the same questions, and will be treated together. The plaintiff is seeking declaratory judgments questioning the constitutionality of the so-called Fair Trade Laws. Defendants, by cross petition, seek to enjoin plaintiff from selling their products at less than the fair trade price. In both cases, the evidence was submitted to the court upon stipulations and upon affidavits and counter-affidavits, it being agreed that such affidavits should be regarded as the testimony of the witnesses as if they were present. No question is raised that the parties are not all properly before the court, and that the court has jurisdiction over the subject matter."

The Court of Appeals decision begins:

"These appeals come to this Court on questions of law from judgments entered for the plaintiffs, appellees herein, in the Court of Common Pleas of Cuyahoga County. The actions seek a declaratory judgment declaring the Ohio Fair Trade Act invalid and unconstitutional. *Both cases involve similar facts and, with the questions to be determined by this Court the same in each case, the appeals will be considered together. The assignment of error is identical in both cases.*"

The Ohio Supreme Court decision likewise begins:

"These two causes originated in the Court of Common Pleas of Cuyahoga County, in each of which is sought a declaratory judgment that the Ohio Fair Trade Act, Sections 1333.27 through 1333.34, Revised Code, is invalid and unconstitutional. The facts in both cases are similar and the law applicable is the same. The appeals will be treated together, since the assignments of errors in both cases are exactly the same."

Judge McNeill's decision in the Court of Common Pleas specifically noted that the issues raised in the briefs were considered by the court, though not discussed by the opinion, in view of such court's finding of lack of constitutionality on state grounds. The Court stated:

"The court deciding this issue as it has, other questions concerning the act raised in the briefs are not discussed."

The Journal Entry entered in the Court of Common Pleas further recited that the provisions of the Ohio Fair Trade Act were "integral and inseparable" necessitating the vitiation of the entire Ohio Fair Trade Act.

argument. The Supreme Court in *Engel v. Vitale*, 370 U. S. 421, carefully distinguished expressions of patriotism from official prayers.

> "There is of course nothing in the decision reached here that is inconsistent with the fact that school children and others are officially encouraged to express love for our country by reciting historical documents such as the Declaration of Independence which contain references to the Deity or by singing officially espoused anthems which includes the Composer's professions of faith in a Supreme Being, or with the fact that there are many manifestations in our public life of belief in God. Such patriotic or ceremonial occasions bear no true resemblance to the unquestioned religious exercise that the State of New York has sponsored in this instance." (370 U. S. at page 435, footnote 21)

*Re Summers*, 325 U. S. 561, supports the validity of the 1931 Act. There, where a bar applicant had refused to take an oath to support the state constitution, this Court held it was not unconstitutional for the state to deny him admission to the bar. This was true even though the state constitution had a provision requiring service in the militia in time of war. The applicant had refused because of his unwillingness based on personal scruples to serve in the state militia in time of war.

If a state can refuse to allow a person to practice law on this ground, surely a state can demand of a teacher, as a condition of employment, the 1931 oath.

THE INTEREST TO BE PROTECTED IS SUBSTANTIAL.

Perhaps the most crucial part of Employees' First Amendment argument concerns the lack of a societal interest to justify the 1955 Act. The Employees must show that the societal interest is not substantial, as in *West Virginia State Board of Education v. Barnette*, 319 U. S. 624. Employees must somehow get around the two reports of the Joint Fact-Finding Committee on Un-American Activities. This they have attempted to do by claiming that parts of the report are false (App. Br. p. 119), and by claiming that the lapse of six years from the report's filing to the 1955 Act is too long for the findings to support the 1955 Act. (App. Br. p. 120)

The *Second Report Un-American Activities in Washington, 1948*, deals, in the main, with the University of Washington. It would serve no purpose to belabor this point. It is a part of the record. When one considers that the reports comprise several hundred pages, it is surprising that Employees can question only a small percentage of its contents. The bulk of the reports stands undisputed.

There is no blanket requirement that every piece of legislation dealing with subversion be preceded by legislative findings, but it cannot be doubted that valid findings often strengthen the legislation when its constitutionality is called into question. After reciting certain legislative findings on the nature of the communist movement too lengthy to be reported here, this Court in *Communist Party v. S.A.C.B.*, 367 U. S. 1, 94, said:

"It is not for the courts to re-examine the validity of these legislative findings, and reject them. See *Harisiades v. Shaughnessy*, 342 US 580. They are the product of extensive investigation by committees of Congress over more than a decade and a half. Cf. *Nebbia v. New York*, 291 US 502. We certainly cannot dismiss them as unfounded or irrational imaginings. See *Galvan v. Press*, 347 US 522; *American Communications Asso. v. Douds*, 339 US 382. * * * "

Nor will this Court give less weight to findings of a state legislature which come to the Court "encased in the armor wrought by prior legislative deliberation." *Bridges v. Calif.*, 314 U. S. 252, 261.

Conceding, arguendo, that conditions could change to such a degree as to vitiate a legislative finding, the dangers resulting from the communist movement referred to in the Joint Committee's report (House Journal 1949, p. 1095 *et seq.*) have not disappeared. This court has, in effect, recognized this fact by deciding the *Communist Party* case, *supra*, on June 5, 1961, although it was based on legislation dating from 1950 to 1954. Subversive activities legislation was passed in 1947, 1949, 1951, 1953 and 1955. Argument that any of this legislation is invalid because additional legislative findings were not made after 1949 seems strained, to say the least.

The Reports of the Joint Fact-Finding Committee reinforce what this Court should decide in any event: There is an interest of the state in self-preservation which justifies the action of the legislature. After this Court's decision in *Garner, Adler*

and *Douds*, all *supra*, it is apparent that Employees do not have a valid argument regarding the lack of societal interest to be protected; their argument, if any they have, must be that the means used to protect this interest are unconstitutional.

Once it is decided that the state has a legitimate interest in not keeping in its employ subversive persons, as they are defined in the Subversive Activities Act, as amended, there can be no question of nexus; for however much one may argue that hardened subversives would not hesitate to sign such an oath thus leaving the man of conscience as the victim, the fact is a legislator would be perfectly justified in believing that the disclaimer oath would have a substantial deterrent effect since the criminal sanction might give the subversive employee or applicant pause. "There is some support for this view," writes Professor Ralph S. Brown, "in the history of New York investigations into the loyalty of public school teachers. Some of the witnesses, who in the early 1940's denied communist affiliation before the Rapp-Coudert committee, ten years later found it advisable to plead the Fifth Amendment in response to similar questions from the Senate Internal Security Subcommittee. One proffered explanation for this change in tactics is the availability of sufficient government witnesses in the current investigation to make a criminal prosecution for false swearing stick." Brown, R. S., *Loyalty and Security*, p. 94.

Regents would not even make reference to the discussion (App. Br. p. 142) of the policy of the

University of Washington regarding speakers on the campus—it being not only outside the record but irrelevant as well—were it not for the fact that it is incorrect; the policy referred to was terminated by resolution on January 24, 1964, by the Board of Regents, a date subsequent to the publication of Appellants' Brief.

## PART VI

## THE 1955 ACT AND THE 1931 ACT DO NOT VIOLATE THE FOURTEENTH AMENDMENT

### THE EMPLOYEES WHO REFUSE TO SIGN THE DISCLAIMER OATH ARE PROBABLY ENTITLED TO A HEARING.

Employees' argument that the 1955 Act violates procedural due process in that it does not allow a hearing seems to have three bases: The Washington Supreme Court allows no hearing to non-tenured personnel and a sham hearing to tenured personnel; no statute allows such a hearing, and the officials charged with administering the acts will allow no hearing, save the sham hearing resulting from the Washington Supreme Court's decision.

It is true that the statutes, court decisions, and administrative actions are the key factors, but Regents submit that they lead to the opposite conclusion.

The Employees, it will be noted, fall into three different categories: those with academic tenure; those with classified civil service tenure, and those with no tenure at all, save possible contract rights.

The Washington Supreme Court has squarely held that those with academic tenure are entitled to a hearing. This has driven Employees into the extreme position of claiming that the Washington Supreme Court sanctioned a sham hearing (App. Br. p. 172), a position which scarcely deserves argument.

With regard to the other two categories no such categoric answer can be given since the Washington high court has not spoken.

First, what is the rule regarding persons with academic tenure? After *Nostrand v. Little*, *supra*, was remanded by this Court to the Washington high court for determination of whether the professors would be accorded a hearing, counsel for the professors argued that under law no hearing could be accorded to the professors. The state attorney argued to the contrary. In its decision the court held:

> "We are of the opinion that the provision in the subversive activies act to the effect that refusal to take the oath 'on any grounds' shall be cause for 'immediate termination of employment,' should not be interpreted in the case before us as meaning that a full professor having tenure rights under his contract of employment is deprived of the right to a hearing as provided in the rules and regulations of the university. In other words, if the professors should refuse to sign the affidavit (which they have not yet refused to do), they, in our opinion, will be entitled to the hearing before the tenure committee and to the other procedures relating to termination of employment prescribed in the university's rules and regulations, set forth in the appendix to this opinion." 58 Wn. (2d) at p. 131.

But what of persons without academic tenure? Employees' argue that under *Nostrand v. Little*, *supra*, neither the Civil Service Act nor the Administrative Procedures Act could be used to accord Employees a hearing; but in fact, the question of whether persons without academic tenure could take advantage of either act was not before the court. On page 121, the Washington high court tried to preclude just such claims by stating: "We, of course, limit our consideration of the problem to the facts before us."

The real thrust of *Nostrand v. Little*, *supra*, is the fact that the court there held that a professor with tenure could not be discharged under the 1955 Act alone and without reference to any other statutes. If the court construed the 1955 Act with RCW 28.77.120 and 28.77.130 there is every likelihood that it would consider other statutes if the last quoted statutes were not applicable this would be the case if a person were without tenure.

The two statutes are the Civil Service Act (chapter 1, Laws of the State of Washington 1961) and the Administrative Procedures Act (chapter 234, Laws of 1959). It should be noted that both acts became law some years after the 1955 amendatory act.

It is well to consider the Civil Service Act first, since it appears to apply to some of the non-academic employees who are among the appellants. (The record does not show that each non-academic em-

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It is well to consider the Civil Service Act first, since it appears to apply to some of the non-academic employees who are among the appellants. (The record does not show that each non-academic em-

ployee would come under the exceptions to civil service coverage listed in section 5.) Section 5 provides in part as follows:

> "At each institution of higher learning the governing body shall within thirty days after December 8, 1960 designate three of its members as a permanent personnel committee, compensated and reimbursed as provided in RCW 41.06.110, to enforce and perform for all its nonacademic personnel, except those in positions specifically exempted by the governing body on analogy to the exemptions of * * * "

The extract from the minutes of a meeting of the Board of Regents on December 16, 1960, shows that the following action was taken:

> "It was noted that the civil service initiative which was approved by the voters on November 8, 1960, became law on December 8, 1960, and has legal application to the University of Washington. Under this law the Board of Regents is required to appoint three of its members as a Personnel Committee to administer the provisions of the law on the campus. This Personnel Committee will serve as the University Civil Service Board.
>
> "Attention was also called to the fact that there are several items in the law which require action by the Board at this meeting, since such action must be taken before January 7, 1961.
>
> "These are:
>
> "That by January 7, 1961, the Board of Regents shall select three of its members to serve as a University Personnel Committee for terms of two, four and six years (appointments thereafter to be for six-year terms) to administer the provisions of the law.
>
> "That by January 7, 1961, the Board of Regents shall designate a full time nonacademic

employee to serve as Director of Personnel to direct and supervise the Personnel Department and to prepare for consideration by the University Personnel Committee proposed rules and regulations required by the law.

"Upon the recommendation of President Odegaard, the Board appointed Mr. Reginald Root to serve as Director of Personnel and named the following members of the Board of Regents to serve as the University Personnel Committee for terms of two, four and six years, respectively:

"Regent Robert J. Willis, Chairman (two years)

"Regent Harold S. Shefelman, Vice-Chairman (four years);

"Herbert S. Little (six years)."

The University Personnel Committee adopted a number of rules on October 27, 1961, including Rule XIV. This rule makes applicable to those under its jurisdiction the provisions of sections 18, 19, 20 and 21 of the Civil Service Act, which provide for a hearing procedure.

But what of those Employees who are covered by neither civil service tenure nor academic tenure? That the Employees are hard pressed to find a reason why a hearing would not be granted is evidenced by the manner in which the Employees have emphasized certain portions of the Regents' statement. (App. Br. p. 172.) A reading of the document simply indicates that the Regents intend to follow the law, it does not indicate that under the law no hearing would be accorded an employee. Likewise on page 173 of their brief, Employees have italicized the

words "on any grounds" found in the 1955 Act. The effect would have been very different if they had italicized the following three words, "*shall be cause* for immediate termination * * *" (Emphasis supplied.) There is, of course, a great difference between a matter being a cause for immediate termination and a matter which must result absolutely in immediate termination.

These Employees are probably entitled to a hearing under the Administrative Procedures Act. It is not a certainty because it has never been passed upon by the Washington Supreme Court. This Court will, of course, assume that a statute will be interpreted by the highest state court in such a way as to avoid raising constitutional problems where such interpretation is possible. *Fox v. Washington*, 236 U. S. 273.

Until this is done it is the intention of the state to allow a hearing on the assumption that it is better to err by allowing too much due process rather than too little. Nor is there anything novel about such an approach. In regard to the third factor, state agencies have, upon the advice of the state attorney general, on numerous occasions accorded a hearing to a party on the basis of the Administrative Procedures Act where no specific hearing is provided by statute. An example of this is *In re Christensen*, No. 84575 Thurston County Superior Court, State of Washington. In this case the director of licenses granted a hearing to an applicant who had been refused a broker's license even though such a hearing was not

specifically provided by the Real Estate Licensing Act (chapter 18.85 RCW).

There are undoubtedly times when a hearing would seem appropriate. For example, if an individual attempted to resign from a subversive organization by communicating with one of the members, it is possible this individual would not be sure whether his resignation was effective, since many of such organizations not having membership cards and lists. If such an individual were to ask for a hearing so that he might explain the steps he had taken to attempt to resign it seems probable that the hearing would be allowed under Washington law and administrative practice.

To prevail on this point, Regents need not show that a hearing is definitely required by the statute. They need only show that such a possibility cannot be ruled out. *United Gas Pipe Line Co. v. Ideal Cement Co.*, 369 U. S. 134, 136. The Employees should not be permitted to profit from the uncertainties arising from this action because of its premature nature.

Since a hearing is probably accorded under Washington law, it is probably not necessary for us to rely upon cases upholding the imposition of a civil disqualification with no right to a hearing, such as *Board of Governors of Federal Reserve System v. Agnew*, 329 U. S. 441, *Gerende v. Board of Supervisor of Elections*, 341 U. S. 56, *United Public Workers v. Mitchell*, 330 U. S. 75, *American Com-*

*munications Association v. Douds*, 339 U. S. 382, and *Cafeteria Workers v. McElroy*, 367 U. S. 886.

How might this act provide such a hearing? Section 9 provides in part: "In any contested case all parties shall be afforded an opportunity for hearing after reasonable notice. * * *" Section 1 defines a contested case as "* * * a proceeding before an agency in which the legal rights, duties, or privileges of specific parties are required by law or *constitutional right* to be determnied after an agency hearing." (Emphasis supplied.)

*Gnecchi v. State of Washington*, 58 Wn. (2d) 467, 364 P. (2d) 225, a case decided *en banc* a few months after *Nostrand v. Little*, *supra*, went beyond what was strictly necessary to reach its holding to indicate that under the Administrative Procedures Act, such an employee would be provided a hearing if the lack of a hearing would deprive him of a constitutional right. The court seemed to be following the lead of this Court. (See *Wong Yang Sung v. McGrath*, 339 U. S. 33.)

One final uncertainty with reference to the disclaimer oath should be mentioned. The record is silent as to the provisions of any employment contract. It is impossible to determine, therefore, whether any of the Employees would acquire any hearing rights in this way.

WHETHER AN EMPLOYEE WHO REFUSES TO SIGN THE 1931 OATH WOULD BE ENTITLED TO A HEARING IS A MATTER FOR CONJECTURE.

It cannot be denied that a literal reading of the 1931 statute indicates that there is less chance that a person refusing to sign the oath it requires would be afforded a hearing than would be the case with the disclaimer oath; yet if the Washington Supreme Court were to read the 1931 statute *in pari materia* with some other statute, such as the Civil Service Act or the Administrative Procedures Act the result would hardly be more surprising than that court's holding in *Nostrand v. Little*, 58 Wn. (2d) 111, 361 P. (2d) 551, on the hearing issue. This leads again to the question of whether the case is ripe for decision, whether there is an actual controversy. (The Court is referred to Part IV for a discussion of this question.)

THE 1955 ACT DOES NOT VIOLATE CONSTITUTIONAL GUARANTEES AS TO VAGUENESS.

In dealing with this question (App. Br. pp. 186-192), Employees' difficulty comes not from stating the general rules but from attempting to apply the general rules to this particular case.

The oath required, and the statutes on which it is based, are not unconstitutionally vague; the terms used therein are susceptible of objective measurement.

Employees have quoted no cases which militate against the validity of this oath. *Cramp v. Florida*,

368 U. S. 278, relied upon by Employees on page 192 of their brief is not applicable for the oath involved in *Cramp* can hardly be compared with the oath in the present case. The former oath provides in part, "* * * that I have not and will not lend my aid, support, advice, counsel or influence to the Communist Party * * *". The Court, itself, seems to have distinguished this case from *Cramp* when, on page 286 it pointed out that:

> "The provision of the oath here in question, it is to be noted, says nothing of advocacy of violent overthrow of state or Federal Government. It says nothing of membership or affiliation with the Communist Party, past or present. The provision is completely lacking in these or any other terms *susceptible of objective measurement*." (Emphasis supplied.)

This Court denied certiorari in a case involving alleged vagueness of the Obey Act which, as pointed out earlier, is very similar to the 1951 Act. *Shub v. Simpson*, 196 Md. 177, 76 A. (2d) 322, 340 U. S. 861. Also significant, is the fact that this Court affirmed *Gerende v. Bd. of Supervisors*, 341 U. S. 56, a decision based upon the *Shub* interpretation. But even more significant is the fact that this Court has affirmed prison sentences—a far cry from this declaratory judgment procedure—stemming from statutes resembling the Subversive Activities Act. One example is the Smith Act, 54 Stat. 671, 18 U. S. C. 2285 (Supp.), as amended. The statute reads in part:

> "Whoever knowingly or willfully advocates, abets, advises, or teaches the duty, neces-

> sity, desirability, or propriety of overthrowing or destroying the government of the United States or the government of any State, Territory, District or Possession thereof, or the government of any political subdivision therein, by force or violence. * * *
>
> "Shall be fined not more than $20,000 or imprisoned not more than twenty years, or both. * * *"

*Dennis v. United States*, 341 U. S. 494, sustained this statute in the face of an allegation, *inter alia*, that it was unconstitutionally vague. In rejecting the contention, the Court said:

> "We agree that the standard as defined is not a neat, mathematical formulary. Like all verbalizations it is subject to criticism on the score of indefiniteness * * *
>
> "* * * We think [the statute] well serves to indicate to those who would advocate constitutionally prohibited conduct that there is a line beyond which they may not go—a line which they, in full knowledge of what they intend and the circumstances in which their activity takes place, will well appreciate and understand."

Regents submit that if a criminal statute can make it unlawful to "advocate * * * abet * * * advise * * * or teach * * * the violent overthrow * * * of the government of the United States or the government of any State * * *" without doing violence to the principle of unconstitutional statutory vagueness, a state is free to require an oath in approximately those terms without doing violence to that principle.

While to set forth other statutes would make this brief unduly prolix, the Court is referred to the statutes involved in *Gitlow v. N. Y.*, 268 U. S. 652, and *Whitney v. Calif.*, 274 U. S. 357. This Court refused to strike down oaths and the statutes upon which they are based, which are much more questionable than those in this case. (*Garner v. Bd. of Public Works*, 341 U. S. 716; *American Communications Association v. Douds*, 339 U. S. 382.)

It is not necessary to set forth the lower court's discussion relating to vagueness. (See, R. 245.) The fact that a unanimous three-judge court found that the meaning was not uncertain or vague—in any event not to the extent that the statute must be held unconstitutional—is itself persuasive that the statutes are not void on their face. The lower court pointed out that a person taking the oath, "* * * is not required to speculate concerning the applicability of every conceivable or rare meaning of the words employed." He need only apply them to his own case. (R. 246.)

Although the subject of subversion is susceptible to overdramatization, it should be pointed out that based upon the history of other nations, a statute would be of little use which included within its ambit only those who participate in the *putsch* itself. It must also include those who provide assistance by supplying weapons and the like. Second, an insurrection is not the work of one man and; as a result a statute, to be of any use, cannot include only those who *alone* carried out the attempted *coup d'etat*.

It would avail Employees little to attack the word "revolution," found in the 1951 statute as being ambiguous by claiming that "revolution" could involve a peaceful and constitutional change; this is so because even if this word were found unconstitutional, only the word would be stricken under the state high court's ruling in *Household Finance Corp. v. State*, 40 Wn. (2d) 451, 244 P. (2d) 260. The companion words "force or violence" would remain.

The cases cited by Employees illustrate the general rule regarding vagueness. Employees have cited no cases—indeed, there are no such cases—to show that the 1955 statute is vague. Thus the parade of "horribles" they cite of, "any gang", *Lanzetta v. N. J.*, 306 U. S. 451, "principally made up of criminal news, police reports or accounts of criminal deeds or pictures or stories of deeds of bloodshed, lust or crime," *Winters v. N. Y.*, 333 U. S. 507, "displays a red flag * * * or device of any color * * * as a sign * * * of opposition to organized government. * * *", *Stromberg v. California*, 283 U. S. 359, and "lend my aid, support, advice, counsel or influence to the Communist Party," *Cramp v. Florida*, 368 U. S. 278, are distinguishable from the 1955 statute.

Once it is determined that the statutes are not void on their face, *Fox v. Washington*, 236 U. S. 273, is applicable, holding that the Court will assume that a statute will be interpreted by the highest state court in such a way as to avoid raising difficult constitutional problems where any such interpretation is pos-

sible. See also *Shuttlesworth v. Birmingham Bd. of Ed.*, 358 U. S. 101. Our state high court would of course, be guided by Section 19 of the 1951 Act which provides in part that, "Nothing in this act shall be construed * * * to limit or infringe upon freedom of the press or freedom of speech or assembly within the meaning and the manner as guaranteed by the Constitution of the United States * * *"

In order to judge whether either oath is a prior restraint in violation of the First Amendment or void for vagueness under the Fourteenth Amendment it is necessary to match the wording of the oaths against the activities and associations of the Employees. The activities and associations of all of the Employees are not set forth in the record; it is, however, possible to assume that in the series of statements of several of the Employees (R. 188-218) the Employees have set forth those associations and activities, in their opinion, most likely to be considered subversive.

Initially it must be conceded that the Employees' statements to the effect that they do not feel they can sign either oath for reasons of conscience cannot be rebutted. The same is true of their belief that the oaths are illegal under the Federal constitution and their belief that signing the oaths would subject them to perjury. But the question of whether the fear of perjury is well-founded is quite another matter. It is not necessary to discuss the affidavits one by one since the affidavits resemble

each other in that the fear of perjury rests on a few types of associations and activities. These activities are working and exchanging information with scholars of countries having a Communist government, editing or contributing to an international scholarly publication and attending academic conferences held under the auspices of a Communist government. The final activity which some of the Employees felt would subject them to perjury was discussing controversial subjects such as the non-recognition of Communist China. (R. 204.)

The organizations listed are nearly all international academic organizations.

It is clear that once the opinions of the Employees as to the legality of the oath and the wisdom of the oath are pared from their affidavits the remaining activities and associations mentioned could by no stretch of imagination result in a conviction for perjury. (A hearing procedure is available, but Regents submit that there would be no risk of perjury to Employees even if there were no hearing procedure to resolve doubts in the borderline area.)

The fact is that the Employees would be remiss in their duties in most cases if they did not belong to these international academic organizations and if they did not write for international publications, or if they did not exchange information of an academic nature with scholars in the same field wherever such scholars may be found, or if they failed to discuss controversial political subjects, statutes and episodes

in history in which, in the opinion of the teacher, the United States acted wrongly. There is no showing that any of the organizations to which the Employees belong "engages in or advocates, abets, advises or teaches, or a purpose of which is to engage in or advocate, abet, advise, or teach, activities intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of the constitutional form of government. * * *" (RCW 9.81.010(3))

It is true that two individuals claim they cannot sign the oath of allegiance because it would conflict with their foreign citizenship. (R. 200, 215) However, in Part VI of this brief Regents have shown that non-citizens have not been requested to sign the oath of allegiance in its statutory form, that they are not at present required to do so and that there is no indication that they will in the future be required to do so.

The point is made that some of the information gained by a Communist government has possible military application. (R. 57) Admittedly, if the test were, does the exchange of information constitute, aid, support, counsel or advice to the Communists, as was true in *Cramp v. Florida*, 368 U. S. 278, the constitutionality of this statute would be more difficult to defend. This, however, is not the test, since the 1955 Act sets forth much more specific requirements.

Nor can it be said that one who engages in the activities set forth by the Employees "aids in the

commission or advocates, abets, advises or teaches by any means, any person to commit, attempt to commit, or aid in the commission of any act intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration" of our constitutional form of government by "revolution, force, or violence." (RCW 9.81.010(5)) Where the Florida statute speaks of "lending aid, support, advice, counsel or influence," the Washington statute speaks in terms of aiding the commission of specific acts of violence. Thus it is clear that the actual threat of a perjury conviction is very different from the Employees' fear of such conviction.

"'Perjury requires a higher measure of proof than any other crime known to the law, treason alone excepted.'" (*State v. Wallis*, 50 Wn. (2d) 350, 311. P. (2d) 659 (1957).) After starting its opinion with the above quote the Washington Supreme Court proceeded to point out, quoting an earlier case, that to convict one of perjury:

> "'There must be the direct testimony of at least one credible witness, and that testimony to be sufficient must be positive and directly contradictory of the defendant's oath; in addition to such testimony, there must be either another such witness or corroborating circumstances established by independent evidence, and of such a character as clearly to turn the scale and overcome the oath of the defendant and the legal presumption of his innocence. Otherwise the defendant must be acquitted.'" (50 Wn. (2d) at p. 353)

This statement of the Washington Supreme Court as to the great quantum of proof necessary to convict one of perjury underscores the lack of a reasonable basis for the Employees' expressed fear.

THE 1931 ACT DOES NOT VIOLATE CONSTITUTIONAL GUARANTEES AS TO VAGUENESS.

Employees assert, as if it were a fact, that "any affiant who subscribes falsely to the statutory oath of undivided allegiance, in addition to loss of employment, subjects himself to possible perjury prosecution, punishable by imprisonment in the state penitentiary for not more than fifteen years (RCW 9.72.010, et seq.)," (App. Br. p. 29) The statute cited is the state's perjury statute.

But is is *not* a crime to violate the oath. The oath provides, "I * * * will support * * * and will * * * promote. * * *" It is thus promissory in form. It is not a disclaimer oath. One promises to do certain things in the future. Can a man go to jail for failing to carry out his promises? No, according to any legal authority Regents have found. The rule is found in 70 C. J. S. 462, Sec. 6, Perjury: "A promissory statement ordinarily cannot constitute perjury or false swearing * * * ordinarily it is held that an official oath cannot be the subject of perjury in so far as such oath involves statements purely promissory." If the legislature had provided a specific penalty for breach of this promissory oath the rule would not apply. The rule is set forth in *State v. McCarthy*, 38 N. W. (2d) 679, 686 (255 Wis. 234):

"The official oath to which the defendant subscribed does not affirm the present existence of a fact, and relates to the future conduct of the affiant. The affiant solemnly promises that *he will* support the constitution of the United States and the constitution of the State of Wisconsin, and that *he will* administer justice without respect to persons, and that *he will* faithfully and impartially discharge the duties of his office. Such an oath is called a promissory oath. * * *

"Violation of an oath of office does not constitute perjury as that offense is defined in the law. * * *

"In 1 Hawkins, P. C. 431, first published in 1716, a standard text on English criminal law, the rule is stated thus:

" 'Also from what has been said it appears that the notion of perjury is confined to such public oaths only as affirm or deny some matter of fact contrary to the knowledge of the party; and therefore, it doth not extend to any promissory oaths whatsoever. * * * "

The fact that it is no crime for a person to violate this oath is the death of Employees' argument that the 1931 statute violates the due process clause because of vagueness. Employees have not produced one case where this Court struck down a statute due to vagueness involving a sanction or lack of sanction comparable to the present case. On the contrary, the cases dealing with vagueness involve a criminal sanction or sanction such as deportation even more drastic than many, if not most, criminal sanctions. (*Jordan v. De George*, 341 U. S. 223. See the annotation, "Indefiniteness of language as affecting validity of criminal legislation—Supreme Court cases," 98 L. Ed. 374.)

THE 1955 ACT AND THE 1931 ACT DO NOT INVOLVE AN UNCONSTITUTIONAL SHIFTING OF THE BURDEN OF PROOF.

Citing *Speiser v. Randall*, 357 U. S. 513, as authority, Employees claim that the 1955 Act involves a denial of procedural due process in that it shifts the burden of proof to the public employee. (App. Br. pp. 182-186) While the Employees' argument might have merit were the oath demanded of the public in general, it has no merit where, as here, the oath requirement is directed to a specific group, to wit, public employees. A much more substantial societal interest exists where a state inquires into the loyalty and fitness of its public employees than where a state inquires into the loyalty and fitness of veterans, or members of a particular race or religion.

The petitioner in *Speiser* prevailed in this Court because of an unconstitutional allocation of the burden of proof in a tax exemption proceeding. This Court went to great lengths to distinguish certain disclaimer oath cases involving a specified group where the oath requirement is backed up by a substantial state interest. Specifically, this Court on page 527, with reference to *Garner v. Bd. of Pub. Wks.*, 341 U. S. 716, *Gerende v. Board of Supervisors*, 341 U. S. 56, and *American Communications Association v. Douds*, 339 U. S. 382, said, "In these cases, however, there was no attempt directly to control speech but rather to protect, from an evil shown to be grave, some interest clearly within the sphere of gov-

ernmental concern." On page 528 the Court said, "The State argues that veterans as a class occupy a position of special trust and influence in the community, and therefore any veteran who engages in the proscribed advocacy constitutes a special danger to the State. But while a union official or public employee may be deprived of his position and thereby removed from the place of special danger, the State is powerless to erase the service which the veteran has rendered his country; though he be denied a tax exemption, he remains a veteran. The State, consequently, can act against the veteran only as it can act against any other citizen, by imposing penalties to deter unlawful conduct." The *Speiser* case, then, cannot be used as authority to support the claim that the 1955 Act involves a deprivation without procedural due process.

Since violation of the oath required by the 1931 Act is not a crime, the very concept of "shifting the burden of proof" would not seem to apply. A bare promise, the breach of which involves no criminal sanction, would hardly suffice to shift the burden of proof.

THE 1931 ACT INVOLVES NEITHER A DEPRIVATION OF SUBSTANTIVE DUE PROCESS NOR A DENIAL OF EQUAL PROTECTION UNDER THE LAW.

By drawing attention to certain parts of the pre-trial order, Employees, on pages 102 and 103 of their brief, have given the impression that aliens are forced to take the oath required by the 1931 Act.

This is not, in fact, correct. This is not the practice of the University of Washington and has not been the practice.

The pre-trial order must be read as a whole. Thus the statement of the President of the University of Washington (R. 175-179) and another paragraph of the pre-trial order (R. 159) must be read along with the portion where aliens are treated specifically. It reads, "For many years, the past practice at the University of Washington with regard to teaching faculty who are aliens, and *at all times material to this cause*, has been *similar* to that suggested by the memorandum circulated through the department of Mathematics and reproduced below." (Emphasis supplied.) The memorandum referred to points out that, "The last clause of the first sentence which reads 'and undivided allegiance to the government of the United States' may be replaced by the phrase 'insofar as it is compatible with my citizenship in .....'" (R. 158-159). Who can say what other oath form would be "similar"? Yet, on page 103 of their brief, Employees actually state, "* * * the record is clear that an oath, perhaps a modified 1931 oath, has always been required of all alien-professors. * * *" This Court cannot pass on a "modified" oath, which is "similar" to the one set forth in the above memorandum. One thing is certain. The very word "modified" means that it is *not* the 1931 oath.

Thus, Employees' claim that this oath is arbitrary and hence void under the due process clause,

in that it requires aliens to take an oath of undivided allegiance to the United States, thereby placing them in the inconsistent position of averring undivided allegiance to one government while retaining the citizenship of their native country, falls of its own weight.

It is at least arguable that the legislature intended the words, "every person applying for a license to teach . . . ." to cover not "every person" in the broadest sense but every person who should owe allegiance to this country. It is to be noted that legislation was enacted prohibiting aliens from teaching *in the common schools* (chapter 38, Laws of 1919, RCW 28.67.010, *et seq.*) Three decades later, chapter 32, Laws of 1949 (RCW 28.67.020, part) amended Section 1 of the 1919 act to allow exchange teachers *in the public schools* "irrespective of requirements respecting citizenship and oath of allegiance." Neither statute referred to institutions of higher education. This demonstrates that the Washington Legislature in 1949 assumed that the 1931 act did not apply to institutions of higher education. But, of course, whether the long-standing interpretation of the 1931 act by the administrative agencies—even though it is entitled to great weight—is the correct interpretation, is a question for the state courts.

Employees claim (App. Br. pp. 100-101) that if the 1931 oath does not apply to aliens as well as citizens the latter have been denied equal protection

of the laws. The question in all "equal protection" cases is whether a reasonable basis for an allegedly unconstitutional classification exists. *Phillips Chemical Co. v. Dumas Independent School District*, 361 U. S. 376; *Daniel v. Family Security Life Insurance Co.*, 336 U. S. 220; *N. Y. Rapid Transit Corp. v. City of New York*, 303 U. S. 573. The classification here is not only reasonable but tends to avoid possible unfairness to alien employees without in any way derogating from the constitutional rights of non-alien employees since the oath of allegiance as applied to them creates fewer problems.

## PART VII

## OTHER CONTENTIONS OF EMPLOYEES

### The 1955 Oath Requirement Does Not Constitute a Bill of Attainder.

The omissions made by Employees in interpreting *Cummings v. Missouri*, 71 U. S. (4 Wall.) 277, and *United States v. Lovett*, 328 U. S. 303, demonstrate the invalidity of their argument that Washington's disclaimer oath requirement is a bill of attainder.

Employees admit that the oath in this case is prospective and cite no case in which this court has found a prospective act to be a bill of attainder. The acts struck down in the *Cummings* and *Lovett* cases and in *Ex parte Garland*, 71 U. S. (4 Wall.) 333, all involved punishment for past misdeeds. It is true that the punishment for past misdeeds was often

conditioned on a future act, but in each case the individual punished could not have avoided the sanction. As one writer has pointed out in 28 Rocky Mt. L. Rev. 258:

> "Garland and Cummings could not alter the fact that they had supported the confederacy in the Civil War. Lovett, Dodd, and Watson could never again qualify as governmental employees whether they changed their loyalties or not."

The Employees', on page 103 of their brief have used, completely out of context, a quote from Justice Frankfurter's concurring opinion in *United States v. Lovett, supra*, to support their argument that a bill of attainder need not also be *ex post facto* in order to be objectionable. An additional few lines from that opinion demonstrate that the Employees' quote is not apposite. At page 323 of *U. S. v. Lovett*, Justice Frankfurter wrote:

> "Frequently a bill of attainder was thus doubly objectionable because of its ex post facto features. This is the historic explanation for uniting the two mischiefs in one clause—'No Bill of Attainder or ex post facto Law shall be passed.' No one claims that § 304 is an ex post facto law. If it is in substance a punishment for acts deemed 'subversive' (the statute, of course, makes no such charge) for which no punishment had previously been provided, it would clearly be ex post facto. Therefore, if § 304 is a bill of attainder it is also an ex post facto law. *But if it is not an ex post facto law, the reasons that establish that it is not are persuasive that it cannot be a bill of attainder. No offense is specified and no declaration of guilt is made.*" (Emphasis supplied.)

Whether or not that statement was applicable in the *Lovett* case, we submit that it is certainly applicable in the present case. In other words, the fact that the statutes involved in the present case are prospective is convincing evidence that the act was not an act of punishment but rather a regulatory act to control the future action of those coming under the act. A member of a subversive organization cannot claim that he is penalized merely because the state requires him to resign from a subversive organization as a condition of his employment by the state. The requirement of non-membership is reasonably related to the end sought: trustworthy public employees.

Employees wholly ignore the Washington Supreme Court's interpretation of the 1955 Act and the constitutional prohibition against bills of attainder. In *Nostrand v. Balmer*, 53 Wn. (2d) 460, 335 P. (2d) 10 (1959), the Washington Supreme Court followed *Garner v. Bd. of Public Works*, 341 U. S. 716, where this Court said on p. 720:

> "* * * The provisions operating thus *prospectively* were a reasonable regulation to protect the municipal service by establishing an employment qualification of loyalty to the State and the United States. Cf. *Gerende v. Board of Supervisors of Elections*, 341 U. S. 56, ante. Likewise, as a regulation of political activity of municipal employees, the amendment was reasonably designed to protect the integrity and competency of the service * * * *and a State is not without power to do as much.*" (Emphasis supplied.)

The fact is that the oath requirement in the present case works less of a hardship on the person affected than the ordinance and charter amendment involved in the *Garner* case, *supra;* for here a member of a subversive organization may resign today and take the oath tomorrow. Justices Burton's and Frankfurter's objections to the *Garner* ordinance are not present here.

If the oath was an employment qualification in the *Garner* case, it is an employment qualification here. In the *Douds* case, *supra*, the Court said on page 391 in upholding the "non-Communist" affidavit provision of the Taft-Hartley Act that voluntary affiliations and beliefs justify an inference concerning future conduct when drawn by the legislature on the basis of its investigations. If the oath was valid as regulating future conduct in the *Douds* case, it is so in the present case.

The Employees' brief contains considerable discussion about Bills of Attainder being prospective. However, there is a dearth of argument to show that the affidavit requirement constitutes a Bill of Attainder even assuming, *arguendo*, that one could be prospective. To begin with, Employees have not shown any punishment and punishment is certainly a prerequisite. Employees have shown nothing to negate the belief of the lower court that the oath requirement is a reasonable employment qualification. As Mr. Justice Frankfurter said in his concurring opinion in *United States v. Lovett, supra*, on page 324:

> "The fact that harm is inflicted by governmental authority does not make it punishment. Figuratively speaking all discomforting action may be deemed punishment because it deprives of what otherwise would be enjoyed. But there may be reasons other than punitive for such deprivation. A man may be forbidden to practice medicine because he has been convicted of a felony, *Hawker v. New York*, 170 U. S. 189, or because he is no longer qualified, *Dent v. West Virginia*, 129 U. S. 114."

Hence, even assuming, *arguendo*, that a bill of attainder could be prospective, the act in question is not a bill of attainder but is an employment qualification. This being true, it would be gratuitous comment for the court to comment on the possibility of "prospective bills of attainder." It would involve overruling, in part, several cases.

It is submitted that there is no merit to Employees' contention.

THERE HAS BEEN NO PRE-EMPTION OF THE 1955 ACT.

The holding in *Pennsylvania v. Nelson*, 350 U. S. 497, so heavily relied upon by the Employees, has been reduced to its precise facts by *Uphaus v. Wyman*, 360 U. S. 72, 76-77 and *Sweezy v. New Hampshire*, 354 U. S. 234.

The portion of the state statute involved in the pre-emption argument in the *Sweezy* and *Uphaus* cases, *supra*, is the same as Washington's. The *Uphaus* case in 1959 is the last case to discuss "pre-emption." There the Court stated that the pre-emption contention "was denied *sub silentio*" in *Sweezy*,

and thus, with these comparable statutes under consideration, the pre-emption argument appears foreclosed to Employees here as well. In *Uphaus*, at page 76, the court distinguished facts within the *Nelson* case from the case under consideration and stated:

> "* * * In *Nelson* itself we said that the 'precise holding of the court * * * is that the Smith Act * * * which prohibits the knowing advocacy of the overthrow of the Government of the United States by force and violence, supersedes the enforceability of the Pennsylvania Sedition Act which proscribed the *same conduct.*' (Italics supplied.) 350 US, at 499. The basis of Nelson thus rejects the notion that it stripped the States of the right to protect themselves. All the opinion proscribed was a race between federal and state prosecutors to the courthouse door. * * *"

The court proceeded, then, to enumerate areas which states could certainly legislate against. (For an excellent discussion of the *Nelson* and *Uphaus* cases and loyalty oath requirements in general see Professor Cramton's article in 43 Minn. L. Rev. 1025, 1959.)

The Employees' conclusion to their pre-emption argument as stated on page 203 of their brief that alien professors must take the Washington State Oath of Allegiance is an erroneous statement disproven by the records in this case, as shown in Part VI of this brief.

In answer to Employees second argument on pre-emption (App. Br. p. 198), if the State of Washington or any other state chooses to set up require-

ments for its employees which do not permit it to accept Federal monies for the teacher or student exchange programs it may be a detriment to the state; however it is incorrect to state that a refusal by the state to accept optional Federal monies for teacher or student exchanges so interferes with American foreign policy as to render the legislation upon which the refusal is based unconstitutional.

It is therefore submitted that Employees' argument concerning pre-emption should be denied.

THE 1955 ACT DOES NOT REQUIRE SELF-INCRIMINATION.

Employees' contention, that the 1955 statute is void as requiring plaintiffs to incriminate themselves with respect to their own disloyalty, is strained, without merit and should be rejected.

The state high court interpreted this statute in relation to the Fifth Amendment privilege against self-incrimination in *Nostrand v. Balmer*, 53 Wn. (2d) 460, 477, 335 P. (2d) 10, and found no merit in a similar contention. There the court stated:

> "Respondents are not compelled by section twelve to do anything. But, if they desire to remain in public employment, they must comply with the standards of eligibility established by the legislature, * * *"

The disclaimer oath would be relevant in a prosecution for perjury only as the occasion which Employees used to commit perjury.

Since Employees are not being required to give testimony against themselves, *Nostrand v. Balmer*,

*supra*, but are merely required, pursuant to the 1955 Act, to disclaim their knowing participation in subversive organizations, the statute does not impinge upon the Fifth Amendment privilege against self-incrimination. *Communist Party v. S.A.C. Board*, 367 U. S. 1; *Konigsberg v. State Bar of California*, 366 U. S. 36; *In re Anastaplo*, 366 U. S. 82; *Lerner v. Casey*, 357 U. S. 468; *Cohen v. Hurley*, 366 U. S. 117; *Beilan v. Board of Education*, 357 U. S. 399; *Gerende v. Election Board*, 341 U. S. 56.

Finally, there is a short but conclusive argument which must be mentioned:

> "It is settled law that the clause of the Fifth Amendment, protecting a person against being compelled to be a witness against himself, is not made effective by the Fourteenth Amendment as a protection against state action. * * *" *Adamson v. California*, 332 U. S. 46, 59; also *Twining v. New Jersey*, 211 U. S. 78, 91-98.

THE DISTRICT COURT WAS CORRECT IN DISMISSING EMPLOYEES' COMPLAINT WITH PREJUDICE.

The three-judge court properly refused to adjudicate questions involving the 1931 Act. *Martin v. Creasy*, 360 U. S. 219 (1959); *United Gas Pipeline Company v. Ideal Cement Company*, 369 U. S. 134 (1962); *Cf.* annotation, Remission of issues to state court, 3 L. ed. 2d 1827; (compare a similar order by this court in *Nostrand v. Little*, 362 U. S. 474 (1960) and 368 U. S. 436 (1962)). In any event, the dismissal with prejudice as to the 1931 Act only precludes the Employees from bringing another action

in the federal court until after the state court has authoritatively construed that act.

The lower court upheld the constitutionality of the 1955 Act and the dismissal with prejudice was the proper order with which to terminate the litigation. The Employee's contention is without merit.

THE DISTRICT COURT WAS CORRECT IN DISMISSING THE STUDENTS.

Allowing the students to challenge the constitutionality of the statutes involved here would do violence to a longstanding judicial principle. This Court observed in *United States v. Johnson*, 319 U. S. 302, 305, that it would refuse to decide any dispute which "does not assume the 'honest and actual antagonistic assertion of rights' to be adjudicated—a safeguard essential to the integrity of the judicial process, and one which we have held to be indispensable to adjudication of constitutional questions by this Court."

Accordingly, in *Poe v. Ullman*, 367 U. S. 497, this Court refused to pass upon the constitutionality of a state statute where the moving party was unable to show that he was threatened with its immediate enforcement.

The general principle from these cases is applicable here since the statutes challenged in this case have no direct application to students; have never been enforced against students and were not intended to affect students. The students cannot show even an indirect injury.

## CONCLUSION

The legislation is not perfect. It is controversial. Many doubt its wisdom. But it violates no constitutional provision and the route is open to legislative amendment and repeal. The wisdom of the statute is, of course, a matter for the legislature, not the courts. See *Daniel v. Family Security Life Ins. Co.*, 336 U. S. 220, at p. 224. There is no reason for Employees to lose faith in the democratic process, a process which repeals oath requirements as well as creates oath requirements. They should not be permitted to avoid the "rough and tumble" of the legislature through this judicial challenge.

This Court should affirm the lower court with regard to its disposition of the challenge to the 1931 Act. Should this Court find that a justiciable controversy exists with regard to the 1955 Act, this Court should affirm the lower court's decision in that regard as well.

Respectfully submitted,

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